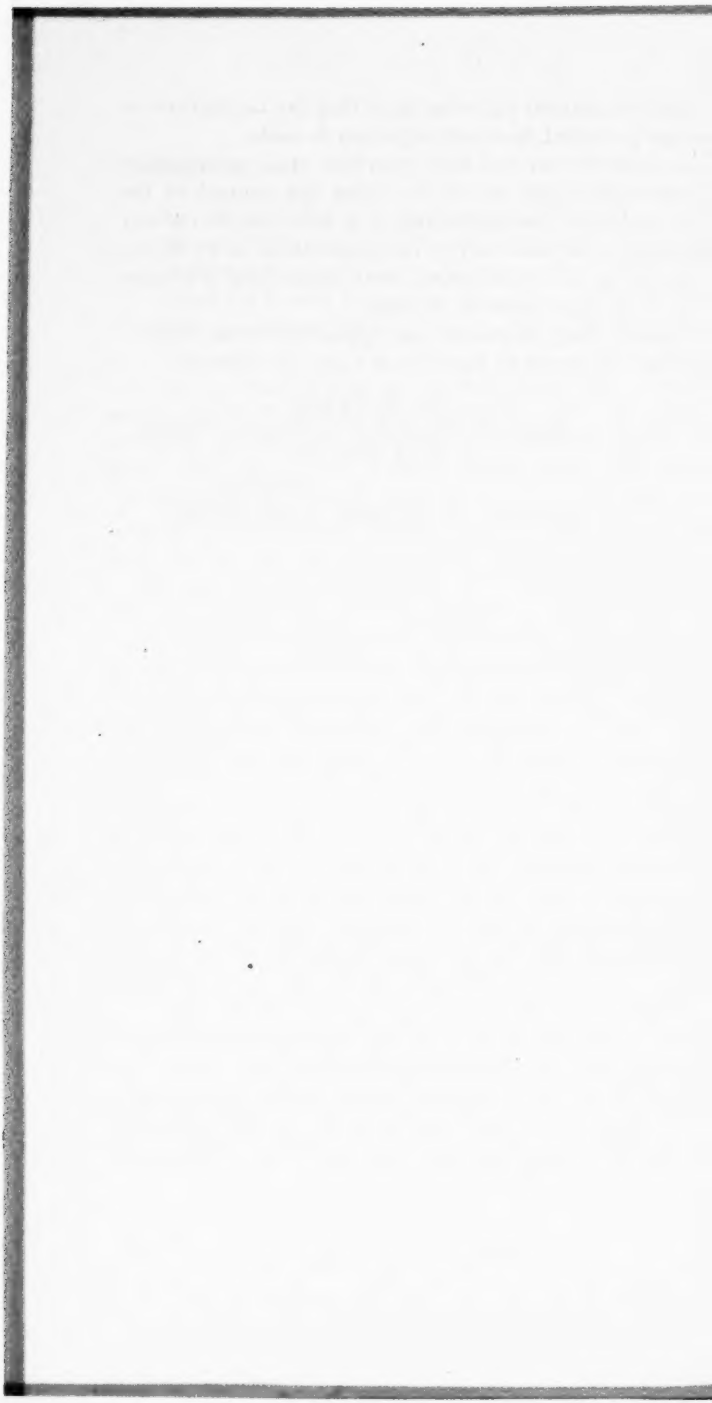

No. 1057, 290.

Brief of Mynderse for C

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Filed May 2, 1898.

Supreme Court of the United States.

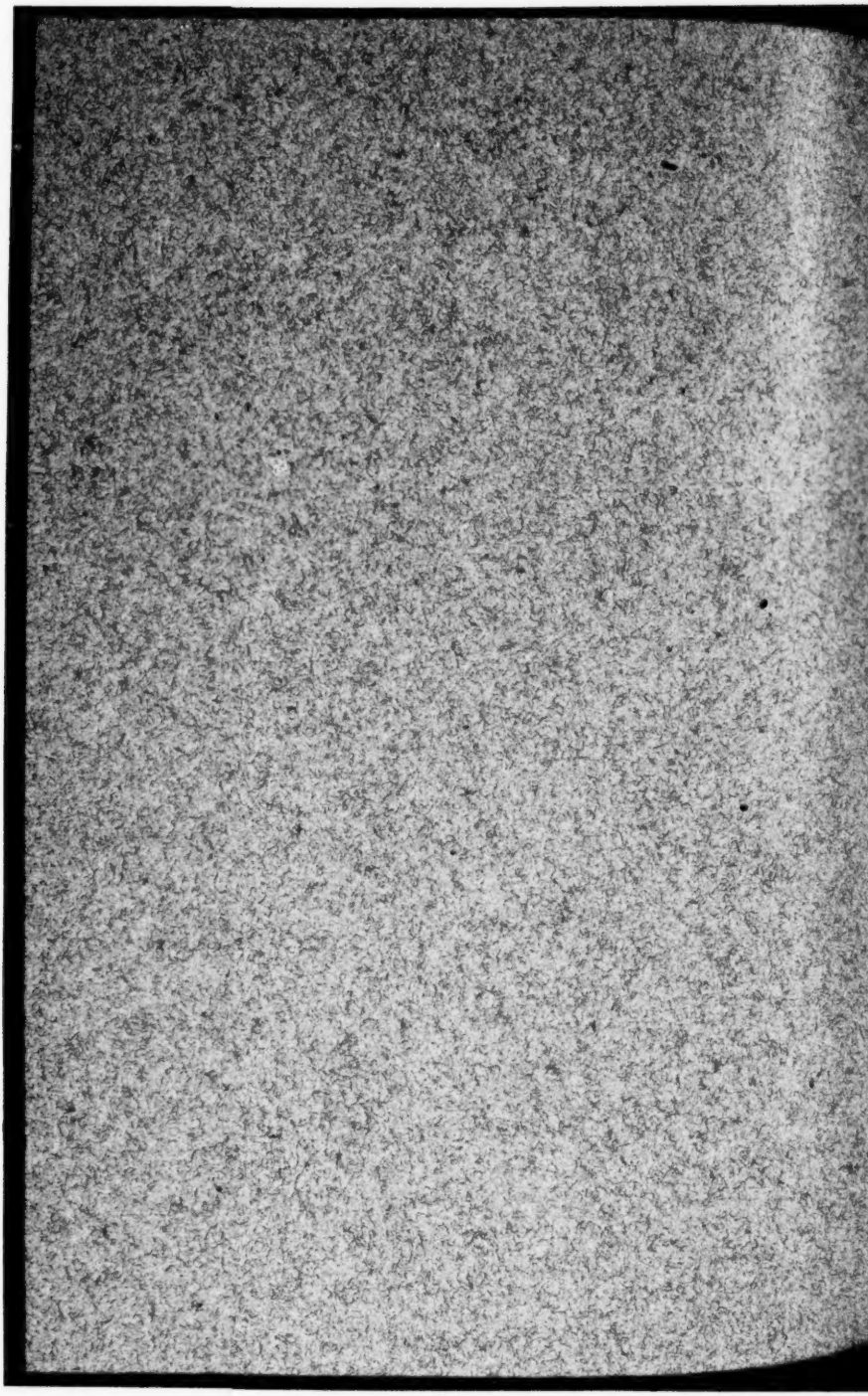
THE CANADA SUGAR REFINING COMPANY (LIMITED),
Libellant and Petitioner,

against

THE INSURANCE COMPANY OF NORTH AMERICA,
Respondent.

Brief in Support of Libellant's Petition for Writ of Certiorari.

WILHELMUS MYNDERSE,
Advocate.



Supreme Court of the United States.

CANADA SUGAR REFINING COMPANY, LIMITED,
Libellant,

against

THE INSURANCE COMPANY OF NORTH AMERICA,
Respondent.

BRIEF IN SUPPORT OF THE PETITION OF LIBELLANT FOR A WRIT OF CERTIORARI.

This action was originally instituted in the District Court of the United States for the Southern District of New York, by the libellant, the Canada Sugar Refining Company, against the respondent, the Insurance Company of North America, to recover insurance effected by the libellant with the respondent in the amount of $15,000 "on "profits on a cargo of sugar against total loss only, valued "at sum insured, shipped on board the British ship *John* "*E. Sayre*, at and from Iloilo to Montreal."

Statement of Facts.

The libellant is a Canadian corporation, and has a factory for the refining of sugar, in Montreal, Canada.

The respondent is a Pennsylvania corporation, engaged in the business of marine insurance.

The libellant claims from the respondent $15,000, with interest, as a total loss under a certificate of insurance issued by the respondent "on profits on cargo of sugar" shipped on board the *John E. Sayre* at Iloilo to Montreal.

In the latter part of December, 1892, the libellant purchased by cablegram from Kerr & Company of Iloilo a cargo of sugar to be shipped on the *John E. Sayre* of "usual assortment" at an agreed price per ton. It was to be paid for by a credit granted by the Bank of Montreal (*Drummond, fols.* 84, 85, 94-96). The quantity purchased was to depend upon the amount the ship would carry.

This quantity being at the time unknown, the libellant applied to the Atlantic Mutual Insurance Company on December 9, 1892, for insurance on the shipment at the rate of $6.50 for each pound sterling of invoice value (*Drummond, fols.* 88, 89). This valuation of the pound sterling at $6.50 is a common rate for insurance purposes, and is intended to protect the insured not merely in respect of invoice cost, but also in respect of the cost of credit, cost of insurance and interest until arrival (*Drummond, fol.* 89).

The Atlantic Mutual accepted the application subject to a stipulation that the total insurance should not exceed $185,000, the limitation being due to the fact that the capacity of the ship was not known (*Drummond, fol.* 87).

Iloilo sugars are in three grades, No. 1, or A, being the most valuable, No. 2, or B, being next, and No. 3, or C, the lowest in value. They are sold in the market under a description of "usual assortment," which means that the shipment shall be made up one-eighth of No. 1, or A, two-eighths of No. 2, or B, and five-eighths of No. 3 or C. The price is an average price for the whole shipment based upon such assortment (*Drummond, fols.* 95-96).

The sugars were loaded at Iloilo on the *John E. Sayre* in January and February, 1893, and the shipment, when completed, was made up of 73,089 mats, weighing 39,360 piculs, or 2,460 tons (*Bills of Lading, Exhs. A, B, C, fols.* 373-384; *Invoices, Exhs.* 1, 2, 3, *fols.* 233-244).

There were 9,561 mats of No. 1 sugar, 17,614 mats of No. 2, and 45,914 mats of No. 3, thus assuring substan-

tially the " usual assortment " (*Bills of Lading, Exs. A, B, C, fols.* 373–384; *Invoices, fols.* 233–244). The invoice value was £22,152 13s. 8d. *Invoices, Exs., fols.* 233–244).

The *John E. Sayre* sailed from Iloilo, February 10, 1893, bound to Montreal (*Rouse, fol.* 129).

By the bills of lading the sugars were consigned to the order of the Bank of Montreal, and were taken up by the libellant from the Bank of Montreal on paying the credit through which the sugars had been purchased (*Drummond, fol.* 86).

While the sugars were at sea there was a decided increase in market values, and the libellant accordingly applied to the Atlantic Mutual on March 30th for additional insurance. This was granted by increasing the valuation of the pound sterling from $6.50 to $7.50 (*Drummond, fol.* 90). This arrangement was finally evidenced by the Atlantic Mutual issuing a policy upon the sugars to the libellant in the latter part of April, by which time the quantity and invoice value of the shipment was known, in the amount of $166,145, being at the rate of $7.50 for each pound sterling of the invoice value (*Drummond, fol.* 92). The policy bore date December 10, 1892, which was the date of the original application for insurance (*Policy, p.* 66).

The increased amount of insurance proving still insufficient to cover the sugars at the existing market valuations, the libellant effected other insurance with the respondent, upon its profits, in the valued sum of $15,000 (*Drummond, fols.* 91–94).

This insurance was made April 29, 1893, and at the time of making it Mr. Drummond informed the respondent that the Atlantic Mutual had issued a policy of $166,145 on the sugars (*Court Minutes of Trial, Record, fol.* 79).

The insurance certificate issued by the respondent reads:

" Insurance Company of North America, Philadelphia.

" This is to certify that on the 29th of April, 1893, this " Company issued under policy No. 117,407, made for " Robert Hampson fifteen thousand dollars on profits on

" cargo sugar. Against total loss only. Valued at sum " insured. Shipped on board of the British ship *John E.* " *Sayre* at and from Iloilo to Montreal. And the loss, if " any, subject to the terms and conditions of the policy, " has been made payable to the order of Canada Sugar " Refining Company, Limited, on surrender of this certi- " ficate " (*Exh., fols.* 245-247).

This certificate was signed by the Vice-President and by the Secretary of the respondent, and was countersigned by the Montreal agent, Robert Hampson, under whose open agency policy the certificate was issued.

On July 4th, while prosecuting her voyage, the *John E. Sayre* encountered heavy fog, and two days later, during the continued prevalence of the fog, stranded on the coast of Newfoundland, a little east of Port au Basque harbor, the nearest settlement being Channel (*Rouse, fols.* 131, 132; *Pike, 10th Int., fol.* 202).

The shore was rocky and the coast was dotted with " terrible reefs," upon which the ship ran at high tide (*Rouse, fols.* 132, 133).

The position of the vessel was one of danger, and the crew abandoned her (*Rouse, fol.* 138). The master alone remained on board with salvors who came to his assistance, fishermen of the neighborhood (*Rouse, fol.* 139).

There was no possibility of saving the vessel, but the master agreed with the salvors to save such cargo as they could. The agreement was that " they were to get half " of what they saved " (*Rouse, fols.* 136-138), which appears subsequently to have been modified as to a small portion of the cargo to an agreed compensation of one cent a pound (*Pike, fols.* 204, 205).

There was a heavy surf running, and the work had to be done in small boats. The fishing boats could not approach within a mile (*Rouse, fol.* 138). Water soon flooded the lower hold, destroying the cargo there. The salvors were able to save from the between-decks about three hundred tons of sugar, some of which was considerably damaged (*Rouse, fol.* 139; *Pike, fol.* 204; *Exhs.* 18, 19, *fols.* 423, 428; *Harvey, Exhs.* 15, 16, *pp.* 110, 111).

The saving of the cargo continued until some time on

the 8th of July, when work was finally abandoned (*Pike, fol.* 202). The ship became a total loss, her wreck being sold for $170 (*Rouse, fol.* 149).

On the evening of July 8th Mr. Pike, representing Harvey & Co., of Newfoundland, agents of the Atlantic Mutual Insurance Company, arrived in Channel in the interests of that company (*Pike*, fol. 202). He found that a portion of the saved sugar was in store, and the remaining portion was still on the fishing boats. He at once took charge of the situation and relieved the master of the vessel from further responsibility. He paid to him $200 in cash previously disbursed by him, and under instructions from the owner, the master turned the cargo over to Mr. Pike and left it in his charge (*Rouse, fols.* 141-145, 153-156; *Pike, 6th, 7th, 8th Ints., fols.* 206, 213, 215).

Mr. Pike, in the course of the following days, adjusted the claims of the salvors. He observed the agreement which had been made with them by the master of the *John E. Sayre*, which was as to the greater portion of the cargo that they should receive "half of what they saved." The portion thus affected weighed net 319 tons 3 cwt. 0 qr. 14 lbs.; and of this there was accordingly apportioned and set off to the salvors 159 tons 11 cwt. 2 qrs. and 7 lbs. (*Pike, fols.* 206-211; *Exh.* 2, *fols.* 437-440; *Harvey, Exh.* 15, *fols.* 405-408). Nearly all of the sugars thus given to the salvors were subsequently purchased from them by Mr. Pike for the Atlantic Mutual, at prices ranging from one half of a cent to two and a half cents per pound, according to condition, about 350 bags being wet. One salvor, however, preferred to retain a small part of his share in kind (*Harvey, Exh.* 15, *fols.* 405-408). The amount of money paid on such purchases aggregated $8,077.51 (*Pike, fols.* 437-440).

The portion saved under the agreement for payment at the rate of one cent a pound was found by Mr. Pike to weigh only 15 tons 9 cwt. 1 qr. and 13 lbs., in respect to which he paid the salvors $346.39. This cargo was all "more or less damaged in the boats" (*Pike, Exh.* 3, *fol.* 441; *Harvey, Exh.* 16, *fol* 409).

The Atlantic Mutual paid to the shipowner his ocean

freight and took over the possession of the cargo (*Rouse, fol.* 148; *Drummond, fols.* 108, 109).

Mr. Pike, after adjusting accounts with the salvors and purchasing their shares of the sugar, reconditioned portions of it, procuring 200 new bags, and then shipped it to Montreal on the coasting steamer *Tiber* (*Harvey, fols.* 181, 182; *Pike, fol.* 203). The shipment was made in the name of Harvey & Co. as shippers, and the sugar was consigned at Montreal to the "Atlantic Mutual Insurance Company" (*Harvey, fols.* 181, 182; *Bills of Lading, Exhs.* 17, 18, 19, *pp.* 104–108; *Pike, fols.* 219, 227, 228; *Drummond, fols.* 104, 111, 115).

These bills of lading covered 9,179 sacks of dry sugar and 845 sacks of wet sugar. The weight of the dry sugar was 307 tons 14 cwt. 1 qr. The weight of the wet sugar was 26 tons, 8 cwt. no qrs. 18 lbs. (*Bills of Lading, Exhs.* 17, 18, 19, *pp.* 104–108).

The total expenses incurred by the Atlantic Mutual Insurance Company in Newfoundland, through Harvey & Co., in respect of the salvage and of the care, reconditioning and forwarding of the sugars, amounted to $10,167.64 (*Harvey, fols.* 178, 179; *Exh.* 16 A., *fols.* 413–416).

The libellant had nothing to do with the handling of the sugars in Newfoundland, nor with the negotiations with the master of the vessel respecting surrender of the sugars there, and was not consulted in any way in those transactions (*Drummond, fols.* 104, 111, 115; *Harvey, fol.* 194; *Pike, fol.* 230).

Upon arrival of the sugars in Montreal the Atlantic Mutual sent an agent, Mr. Darragh, to receive them. He entered into negotiations with the libellant with the view of their taking delivery of the sugars, and with the result that the libellant finally accepted them "on a settlement" at approximately the insured value" (*Drummond, fol.* 105).

The bills of lading under which the sugars had been shipped on the *Tiber* were endorsed by "The Atlantic Mu-"tual Insurance Company per A. A. Raven, Second "Vice-President" (*Bills of Lading, Exhs.* 17, 18, 19, *fols.* 420, 426, 430), and with these in his hands Mr. Darragh

secured delivery of the sugars from the *Tiber* and turned them over to the libellant (*Drummond, fols.* 104, 105).

On the settlement between the libellant and the Atlantic Mutual the libellant paid the *Tiber's* freight of $4 a ton, and allowed to the Atlantic Mutual the difference between that freight and the freight paid by the Atlantic Mutual to the *John E. Sayre* (*Drummond, fols.* 110, 111).

In taking over the sugars no attempt was made to ascertain how far the original "assortment" had been disturbed; it being impracticable to determine that fact, and no attempt was made to measure accurately the damage that had come through the wetting of the sugar (*Drummond, fol.* 107). They were taken over in their existing grades, condition and quality at substantially the value insured in the Atlantic, there being no market value for raw sugars in Montreal, as being a "fairly equitable basis" (*Drummond, fols.* 105–107).

The libellant had learned through the newspapers, on July 7th, of the stranding of the *John E. Sayre*, and reported the fact by telegraph at once to the Atlantic Mutual (*Drummond, fol.* 98), who, on the same day, wrote to the libellant acknowledging receipt of the information, and saying they had previously received word through other channels, and had put the matter in the hands of Harvey & Co. of St. Johns, Newfoundland (*Drummond, fol.* 100; *Exh.* 5, *fols.* 249, 250).

Under date of July 10th the Atlantic Mutual wrote to the libellant:

"Our latest information is that all the sugar between-
"decks has been saved, and we hope to arrange to have
"it sent to Montreal" (*Exh.* 6, *fols.* 251, 252).

On July 14th the libellant learned of sugars being offered for sale in Montreal, and telegraphed to the Atlantic Mutual as follows:

"Sugar supposed *ex John E. Sayre* being offered here
"by brokers representing Newfoundland parties" (*Drummond, fol.* 102).

They confirmed the telegram by a letter of the same date in which they wrote:

"We have within the last day or two been repeatedly "asked to offer for sugar by Newfoundland parties.
"To-day an inquiry was received for our best price for "about 200 tons Iloilo sugar *ex John E. Sayre* from Archi- "bald & Co., North Sydney.
"We gave no answer to these persons, but advise you "by telegram that your local agent in North Sydney may "protect your interest" (*Exh.* 6, *fols.* 253, 254).

In acknowledging receipt of the telegram the Atlantic Mutual wrote:

"The master of the vessel agreed with salvors to give "them one-half of the sugar saved as salvage, and our "correspondents at St. Johns offered to purchase their "half and forward the whole to Montreal. It is quite "likely that the salvors, not satisfied with the offer made "to them, are endeavoring to ascertain whether more "money cannot be made by selling their share of the "sugar in Montreal" (*Exh. No.* 8, *fols.* 257, 258).

During the progress of these events the libellant gave to Mr. Hampson, the Montreal agent of the respondent, all the information it had. The position of the vessel and the cargo was discussed with him by Mr. Drummond upon the information then in Mr. Drummond's possession, and everything that became known to the libellant was communicated from time to time to this agent (*Drummond, fol.* 113).

Upon these facts the libellant claimed a total loss from the Insurance Company of North America under the insurance of profits. Upon the claim being questioned, formal proofs of loss were served August 23, 1894 (*Ex.* 10, *pp.* 67–87).
The considerable delay was due to the long consideration given to the claim by the respondent before finally rejecting it (*Art.* 8, *Proofs of Loss, Ex.* 10, *fols.* 285–287).

The libellants filed their libel on the 27th of November, 1894, in the District Court of the United States for the

Southern District of New York, and the cause was tried in December, 1896, before Hon. Addison Brown, District Judge.

He rendered a decision June 15, 1897, in favor of the libellant, and upon that decision a final decree was entered June 15, 1897, for the amount of the insurance, with interest and costs, aggregating $18,056.45 (*Record, fols.* 3, 4).

The Insurance Company then appealed to the United States Circuit Court of Appeals, where the cause came on for argument in March, 1898.

An opinion was filed in the United States Circuit Court of Appeals April 19, 1898, directing the decree of the District Court to be reversed, with costs, and that a mandate issue to the District Court to dismiss the libel (*fols.* 477–501).

Upon that decision a formal order has been entered for the issuance of a mandate (*fols.* 503–506).

A petition for a writ of *certiorari* was duly served upon the proctors for the respondent on the 27th day of April, 1898, and was filed in this court April 28th.

POINTS.

First.

THE ONLY PROFITS TO BE CONSIDERED ARE THOSE IN EXCESS OF THE VALUE OF $166,145 INSURED BY THE ATLANTIC MUTUAL INSURANCE COMPANY UPON THE CARGO.

When the respondent issued its certificate of insurance on profits, the existing value of the cargo was "about $181,000." This is alleged in the libel (*Libel, Art.* 5, *fol.* 10), and the respondent in its answer admits that "at the "time of such insurance the value of the said sugar, ex-

"clusive of freight, was about $181,000" (*Ans.*, *Art.* 4, *fol.* 62).

At the time of making insurance with the respondent, Mr. Drummond, the president of the libellant, informed the respondent's agent that the sugar itself was insured in the amount of $166 145 in the Atlantic Mutual (*Court Minutes of Trial, December* 7, 1896; *Record, fol.* 79).

The fact was therefore recognized at the time that the libellant's existing profits were about $15,000 in excess of the amount insured by the Atlantic Mutual, and the respondent thereupon issued its policy on such profits "valued at sum insured."

This circumstance may become material in two aspects:

A. If it becomes necessary to consider, in determining whether or not abandonment was essential, what profits, if any, survived the disaster, we shall need to have a true basis of original value for computing such profits. Such basis, so far as the respondent is concerned, is $166,145, the value insured on the cargo by the Atlantic Mutual. The profits over and above that amount are what were insured by the respondent. It does not concern them when or how or at what price the libellant first acquired the sugars. The price paid by the libellant to Kerr & Company, as represented by the invoices, is no more material to the respondent than would be the cost of raising the sugar if the libellant had raised it on his own plantation.

When the respondent issued the certificate of insurance the two interests of the libellant were defined—one at $15,000 as libellant's profits in the sugar, and the other at $166,145, representing its principal value.

B. If the question arises as to whether there was a loss of profits through the disaster. This is scarcely a possible contingency, inasmuch as the profits were valued in the policy or certificate.

Second.

THERE WAS AN ABSOLUTE AND ACTUAL TOTAL LOSS OF PROFITS, IN RESPECT TO WHICH THE LIBELLANT IS ENTITLED TO RECOVER THE FULL AMOUNT INSURED.

It is important to note the phraseology of the certificate of insurance. It is for

"$15,000 on profits on cargo sugar. Against total loss "only" (*Cert. of Ins., Exh.* 4, *fols.* 245, 246).

These words are not ambiguous, and the only natural construction is that the insurance is made against the total loss of profits. Whether this was wise insurance or not for the respondent to make is another question. But it has assumed its risks and should have contemplated, before issuing the certificate, just what it was insuring.

The responsibility of the respondent is not conditioned upon a total loss of cargo, but upon a total loss of profits.

While insuring against "total loss" renders the insurer liable for a "constructive total loss," the question will for the present be treated as though such insurance protected the insured only in respect to an "absolute total loss" or "actual total loss."

From every point of view there was an actual or absolute total loss of profits.

A. The original cost of the shipment was £22,152 13s. 3d. (*Drummond, fol.* 85, *Exhs.* 1, 2, 3, *pp.* 59, 60, 61), or about $110,000. The value of the sugars which reached Montreal was "about $20,000" (*Libel, Art.* 7, *fol.* 18; *Ans., Art.* 6, *fol.* 67). This was their gross value on arrival in Montreal, without deductions for the extraordinary expenditures made for salvage, storage and forwarding, aggregating $11,500 (*Harvey, Exh.* 16*a*, *fols.* 413–415), or for the ocean freight paid by the Atlantic Mutual to the owners of the *John E. Sayre*, the amount of which is not exactly known (*Rouse, fol.* 148).

Not only were there no profits, but there was an enormous loss.

B. If the proceeds of the voyage are compared with the value of $166,145, designated as the value at the time the respondent's insurance on profits was made, the disappearance of profits is still more conspicuous.

C. Treating the arrived portion of the cargo by itself, the same result is reached—the total disappearance of profits, either on the basis of the invoice value of the cargo or on the basis of the insured value of the cargo.

The amount of cargo that reached Montreal was about 325 tons net (*Libel, Art.* 7, *fol.* 16; *Ans., Art.* 6, *fol.* 67; *Drummond, fol.* 104; *Harvey, Exhs.* 17, 18, 19, *pp.* 104–108).

The shipment had originally weighed about 2,460 tons (*Rouse, fol.* 130); so that only about one-eighth of the cargo reached destination. Such remnant came to Montreal in a broken "assortment," and a considerable portion of it in a damaged condition (*Drummond, fol.* 105; *Harvey, Exhs.* 17, 18, 18, *pp.* 104–108; *Pike, fol.* 204). Its value in this condition, freight paid, was admittedly "about $20,000" (*Libel, Art.* 7, *fol.* 18; *Ans., Art.* 6, *fol.* 67), to preserve which value expenditures for salvage, storage and forwarding had been incurred in the amount of $11,500, leaving a net value (without consideration of ocean freight) of about $8,500.

Assuming that the libelant had no insurance on the cargo, it would have found the proceeds of the arrived cargo, after payment of ocean freight, only about $7,000.

The original value of these 325 tons, based upon the invoice value of £22,152 13s. 3d., was about $15,000; and based upon the insured value of $166,145, was about $22,000.

D.—If we look at the matter still more critically and consider each bag of sugar or each pound of sugar by itself, and treat the profit insured thereon as being a "mere excrescence" or "incident" to the cargo, it was absorbed and extinguished when Captain Rouse made his

agreement with the salvors that they should have half of what they saved.

The profits insured by the respondent were only about nine per cent. of the value of the cargo, being only $15,000, while the cargo was insured for $165,145. The salvage was fifty per cent. and under the particular form of Captain Rouse's agreement with the salvors, one-half of every bag, *one half of every pound of the cargo belonged to the salvors.* The agreement which he made with them was, in the first instance, that they were "to get half of what they saved" (*Rouse, fol.* 136; *Pike, fol.* 205). His agreement was carried out literally and fairly by the representative of the Atlantic Mutual. He caused the sugar to be weighed in the presence of the salvors and set off their half to them (*Pike, fols.* 208, 226; *Exh.* 2, *fols.* 437-440), and then later purchased "the portion of the salvors" at rates varying from one-half a cent to two and a half cents a pound, according to its condition (*Pike, fols.* 212, 213; *Exh.* 2, *fols.* 237-240; *Harvey, Exh.* 15, *fols.* 405-408).

A small portion of the sugar was saved under a somewhat different but more onerous contract with the salvors, the stipulated payment being one cent a pound. As all this portion of the cargo was wet (*Pike, Exh.* 3, *fol.* 441; *Harvey, Exh.* 16, *fol.* 409), the compensation of the salvors was heavier than under the original arrangement. The modification related only to the last fifteen tons that came from the wrecked vessel (*Pike, Exh.* 3, *fols.* 441-444).

The particular form of the agreement with the salvors is material in more aspects than one; and *the attention of the Court is therefore attracted to the circumstance that as each pound of sugar reached the Newfoundland shore an undivided one-half interest therein, or a still greater interest, belonged to the salvors.*

A recent English case was for £2,000 "on profit on "charter * * * warranted free from all average."

The plaintiffs chartered the steamer *Govino* for a lump sum of £3,900, and offered her for general cargo in the Persian Gulf. While in the course of loading, and before knowing just what their profits would be, they insured

them as above for £2,000. Upon completion of loading the freight under bills of lading aggregated £4,690, showing a profit to the charterers of £790. The vessel sailed for London, the port of destination, and while in the course of discharging her cargo there was collided with by another vessel and was sunk.

Thereby, a considerable portion of her cargo, consisting of dates, was ruined, and the freight, which would have been earned on delivery of the dates, was lost.

The result was that the freight actually collected in London was less than £3,900.

The Court held that the loss on profits was total, the returns from freight being insufficient to meet the charter hire. Judgment was given, therefore, for £790.

Asfar & Co. vs. *Blundell*, *Law Rep.*, 1 *Q. B.*, 1895–1896, *p.* 123.

This case fully sustains the libellant's contention that there was a total loss of profits in every sense of the word, actual as well as constructive, when the value of the outturn in Montreal (which in gross was only $20,000) did not equal the amount of the original invoice values, which were in fact about eight times the saved value.

Third.

THE LOSS OF THE CARGO AND THE EXPENSES INVOLVED IN FORWARDING THE SAVED PORTION TO MONTREAL ENTITLE THE LIBELLANT TO RECOVER AS FOR A TOTAL LOSS.

There are three well defined grades of insurance applicable to any subject of marine insurance, to wit, insurance against "partial loss," against "total loss," or against an "actual or absolute total loss."

Insurance which protects against partial loss gives to the assured the right to reimbursement in respect of any damage or detriment that may come to the injured property through marine perils.

Insurance against total loss entitles the insured to recover the entire insurance upon establishing a constructive total loss.

When insurance is made against actual or absolute total loss only, then the subject of insurance must be annihilated.

Insurance under the phrase "total loss" simply is satisfied by a constructive total loss with a seasonable abandonment.

Arnould on Marine Ins., 952.
McArthur on Marine Ins., 275.
Lowndes on Marine Ins., 132, 133.
Parsons on Maritime Law, Vol. II., 338-341.
Phillips on Ins., *Secs.* 1485, 1487.

If the underwriter desires to protect himself from liability for a constructive total loss, he makes his insurance to read "against actual total loss only."

Munroe vs. *B. & F. Marine Ins. Co.*, 52 *F. R.*, 777.
Burt vs. *Brewers & Malsters' Ins. Co.*, 78 *N. Y.*, 400.
Carr vs. *Security Ins. Co.*, 109 *N. Y.*, 504.

A "constructive total loss" of a cargo occurs when more than fifty per cent. of its value has been destroyed.

Phillips on Ins., *Sec.* 1608.
Parsons on Maritime Law, Vol. II., 371.

The cases cited by the counsel for the insurers do not sustain him.

In the case of *Burt* v. *The Brewers and Maltsters' Ins. Co.*, 78 *N. Y.*, 400, the insurance was specifically against "actual total loss" only, and of course no question of constructive total loss could arise thereunder.

In the case of *Chadsey* vs. *Guyon*, 97 *N. Y.*, 333, the cargo was warranted by the assured free from particular average. The subject of insurance was a shipment of potatoes in barrels, and the question considered by the Court was whether the insurance could be apportioned and made applicable to each barrel of potatoes, thus permitting the assured to recover in respect of a total loss of part.

In the case of *Humphrey* vs. *The Union Ins. Co.*, 3 *Mason*, 440, the subject of insurance was a cargo of lemons and oranges in boxes insured under the memorandum clause, free from particular average. The oranges were destroyed, while the lemons sustained comparatively slight damage, and the question was whether a recovery could be had for a total loss of part.

But to entitle the insured to recover his full insurance upon a constructive total loss, he must ordinarily make a timely abandonment to his underwriters. This is so in respect of insurance upon a vessel or of insurance upon cargo.

An abandonment, however, is not always necessary, nor even proper, in the case of insurance upon profits.

The latest English writer says:

" Notice of abandonment of profits may sometimes be " necessary. If there is no valid insurance on the goods " so that no abandonment could be made to the under- " writers on goods, a notice of abandonment should be " given in any case where it would be required with refer- " ence to the goods if the goods were insured. It is better " to give notice of abandonment in any case where the " goods are not totally destroyed."

Tyser on Mar. Ins. Losees, Sec. 109.

This is in accord with our own writers and our own decisions to the effect that an abandonment of profits is not necessary or proper when there is an insurance upon the goods themselves, for the reason that the insurer on goods has a right to a complete and absolute abandonment of the cargo with all of its increments and incidents.

" Profits are so far distant from cargo that if both are " insured it is said that there may be a several abandon- " ment of each. But it is not easy to see how anything " can pass by the abandonment of profits. For the in- " surers on goods take by the abandonment to them " everything on which profits have been made, or can be " made or saved."

Parsons on Maritime Law, Vol. II., 394.

" A policy upon expected profits does not seem to offer " anything upon which an abandonment can operate.

"And it does not appear from any speculation or any "judicial opinion relating to this subject which has come "to my knowledge that an abandonment of this interest "can be of any importance to the underwriters, other- "wise than as a notice that a total loss is claimed; and if "this is its only effect an abandonment is not necessary. "* * * It does not appear, therefore, that an abandon- "ment of profits can be anything more than a nugatory "ceremony."

Phillips on Insurance, Sec. 1503.

"But admitting that this is to be regarded as a valued "policy, it is said that the assured by abandoning the "cargo to its underwriters has put it out of the "power of the defendant to receive any salvage on "the profits, and that, therefore, he (the assured) "has no right to recover in this suit. This is a dilemma "which the defendant ought to have foreseen at the time "of his subscription; he must have supposed there was "a policy on the cargo which in case of disaster would "naturally be abandoned to those who had insured it. It "is idle to complain of what must have been clearly his "own understanding of the contract; nor is it reasonable "in him to expect that for the purpose of recovering on a "small policy on profits a merchant should, by not aban- "doning the cargo, forego his insurance on that sub- "ject."

Mumford vs. *Hallett*, 1 *Johnson's Rep.*, 433, 439.

In an earlier case the same court, in passing upon a claim against the insurer of profits, said:

"Whatever might have been the claim of the defend- "ant (the insurer on profits) on the insurers of the cargo "if an abandonment had been made to them (on which "our opinion is reserved), we think, as between him and "the owner, he had a right to pay the right cost of the "goods with all the charges and profits, according to valu- "ation, and on those terms to insist on an assignment. "To enable him to assert this right there ought to have "been a seasonable abandonment which, notwithstanding "the decision just referred to, should always be made as "soon as possible, where the disaster, as was the case "here, is of such nature as not to divest the assured of "property. This is a case of some novelty on which "precedents throw very little if any light. It is very "probable, therefore, that our view of it may be incorrect,

" but, after mature reflection we cannot come to any
" other result satisfactory to our own minds. If wrong,
" the precedent will not work much mischief, for it can-
" not be long before underwriters, in this State, at least,
" discover the folly of insuring, unless at a very advanced
" premium, either profits or freight."

Tom vs. *Smith*, 3 *Caines*, 245, 251.

As to the mere matter of form, therefore, it is apparent that the libellant is not prejudiced by the fact that an abandonment was not made to the respondent.

An abandonment, moreover, is not called for when the loss is total. The only function is to convert a constructive total loss into a total loss.

If the sugars were to be abandoned to any one they would need to be abandoned to the Atlantic Mutual Insurance Company. Such abandonment would take with them all profits in every form of increment and incident. There would be nothing left to abandon to the the respondent. The reasoning in the case of *Tom* vs. *Smith* shows that the only object of abandonment to the respondent would be to enable him to redeem the abandoned cargo from the Atlantic Mutual, paying to the Atlantic Mutual its loss, and paying to the libellant its insurance. Such a right would be absolutely barren, a right as valueless as the abandonment of a ship that has been annihilated by storms and sent to the bottom of the ocean, and in such situation no abandonment is necessary.

Fourth.

THERE WAS A VIRTUAL ABANDONMENT OF THE SUGARS BY THE LIBELLANT TO THE ATLANTIC MUTUAL INSURANCE COMPANY, AND AN ACCEPTANCE OF SUCH ABANDONMENT, BY WHICH THE SUGARS BECAME A CONSTRUCTIVE TOTAL LOSS TO THE LIBELLANT. AND WITH THE LOSS OF THE SUGARS, ALL PROFITS WERE LOST.

In determining the character of the transactions between the libellant and the Atlantic Mutual Insurance

Company, the respondent, so far as it is concerned, is not in position to raise hypercritical questions as to form.

The course of events indicates an abandonment by the libellant to the Atlantic Mutual and an acceptance of abandonment by that company. There are forms lacking which would have been supplied at any moment by the libellant if the insurer had indicated a disposition to question the abandonment.

But forms may be waived and some were waived in this case. But such circumstances did not render the abandonment of the cargo less effective, nor can advantage be taken of any omissions of form by the respondent. Even a defendant underwriter may be held responsible for a constructive total loss when there has been no formal abandonment, upon the ground either that he has waived an abandonment or that his actions indicated that the proceedings were sufficient to constitute an abandonment.

"If an abandonment is wanting in any formality the "insurer may waive all objection, and they do this by "calling for the proof and acting as if the abandonment "were altogether sufficient."

Parsons on Maritime Law, Vol. II., 398.

"In the United States the courts hold, that where the "nature of the transaction is such as to leave no reasona-"ble doubt of the intention of the insured to abandon, "and of that intention being understood by the under-"writer, it shall be implied that a proper offer of aban-"donment has been made, though no formal notice can "be proved to have been given."

Arnould on Mar. Ins., 958, 959.

"Mr. Justice STORY, speaking of abandonment and "notice of abandonment in the case where notice was re-"quired by the policy, but neither the form of notice nor "the abandonment was described, said: 'They may be in "'one or two instruments; they may be in direct terms "'or by fair and natural inferences; it matters not how "'they are given or executed.'"

Phillips on Ins., Sec. 1678.

What happened in this case?

On July 7th the libellant telegraphed to the Atlantic

Mutual that the *John E. Sayre* was reported ashore off the coast of Newfoundland (*Drummond*, 7, *fol.* 98). In acknowledging receipt of this notice the Atlantic Mutual announced that they had been previously advised of the disaster and had put the matter in the hands of Harvey & Co., their agents at St. Johns, Newfoundland (*Exh.* 5, *fols.* 249, 250).

The libellant took no part in the rescue of the sugar, was not asked to take part, and in fact was not expected to take part.

The Atlantic Mutual took entire control and on July 10th wrote to the libellant that sugar had been saved from the between-deck, and that they hoped "to arrange to have it "sent to Montreal" (*Exh.* 6, *fols.* 251, 252).

A few days later, July 14th, the libellant, learning that inquiries were being made in Montreal for a market for certain of the sugar, telegraphed to the Atlantic Mutual:

"Sugar supposed *ex John E. Sayre* being offered her "by brokers representing Newfoundland parties" (*Drummond, fol.* 102).

On the same day this telegram was confirmed by a letter in which the libellant wrote:

"We gave no answer to these persons, but advise you "by telegram that your local agent at North Sydney *may* "*protect your interests*" (*Exh.* 6 *X, fol.* 253).

To which the Atlantic Mutual replied on the same date:

"Have not authorized sale. Master of *Sayre* agreed to "give salvors one-half sugar. We have directed all for- "warded to Montreal, allowing one cent pound salvage" (*Exh.* 7, *fol.* 257).

In confirming this telegram the Atlantic Mutual wrote, setting forth the agreement made between the master and the salvors, and stating that they were in treaty to purchase the salvors' half of the salved sugar.

This is all that passed between the libellant and the Atlantic Mutual until the saved fragments of the shipment reached Montreal in August.

What had happened in Newfoundland?

The agent of the Atlantic Mutual had appeared at the scene of the wreck, had displaced the master of the *John E. Sayre*, had paid the ocean freight upon the sugars to the owners of the vessel (*Rouse, fol.* 148; *Drummond. fols.* 108-109), and had taken entire control of the cargo, The master testifies:

" Mr. Pike took charge of the cargo, and of course I had " paid some two or three hundred dollars expenses in " landing and storing it, which he paid me back; or two " hundred of it he paid me back. Well, that was all I " knew about the cargo. I was done with it then.

" Q. You left it then in his hands? A. I left it in his " hands " (*Rouse, fols.* 143, 144).

And under cross-examination he says:

" Q. When did you cease to have to do with the cargo, " captain? A. Well, when I was paid this $200 on ac- " count and instructed to give up the cargo by my owner.

" Q. That was about when? A. Well, I couldn't tell " you the date; it was one or two days or perhaps three " days after the ship was stranded, but the date I don't " just remember " (*Rouse, fol.* 149).

The Atlantic Mutual's agents then weighed the sugar in the presence of the salvors, set off to the salvors the half that belonged to them, and subsequently purchased such half (*Pike, fols.* 226, 213; *Exhs.* 2, 3, *pp.* 110, 111).

The Atlantic Mutual were then in supreme control of the salved sugar. The master and owners of the *John E. Sayre* had been paid off and had left the scene (*Rouse, fols.* 141-148; *Harvey, fols.* 174, 175, 182, 183, 187, 190, 192; *Pike, fols.* 206, 207, 212, 213, 218, 219, 220, 222).

To be sure they had undisturbed possession at that time of only one-sixteenth of the original cargo, the title to the remaining portion of the salved cargo being vested in the salvors. They, however, purchased the salvors' portion, and by purchase, *and by purchase only*, acquired title to another sixteenth. The sugar was then shipped to Montreal under a new contract of transportation. The original voyage had been broken up, and the contract between the shippers and the shipowner abandoned.

The new shipment was made in the name of Harvey & Co., they being the agents of the Atlantic Mutual Insurance Company, upon the coasting steamer *Tiber*, for delivery at Montreal, "to the Atlantic Mutual Insurance Company of New York" (*Harvey, Exhs.* 17, 18, 19, *fols.* 419, 424, 429).

Here was a complete assumption and declaration of ownership by the Atlantic Mutual.

Mr. Drummond has testified to what occurred when the sugar arrived in Montreal.

"When it arrived the Atlantic Mutual sent a represen-
"tative (Mr. Darragh) to Montreal, who received it, and
"subsequently handed it over to us on a settlement.

"Q. From Mr. Darragh? A. Yes.

"Q. On what basis of value did you receive that sugar
"from Mr. Darragh, do you remember? A. I am not
"very sure; I think we took it approximately at its in-
"sured value, if I remember rightly.

"Q. Was any examination made by you of the grades
"of the sugar which arrived as to whether it was one,
"two and three, or not? A. Impossible to do that; we
"took it as an average.

"Q. It has been shown that certain of these bags of
"sugar were wet; was there any attempt made by you
"to adjust any item of loss in that respect accurately
"with Mr. Darragh? A. I don't think so" (*Drummond, fols.* 104-106).

"Q. What do you consider as to your legal rights in re-
"spect to this sugar, when it came to Montreal? A. Prac-
"tically the sugar was in the possession of the Atlantic
"Mutual Insurance Company; was their property; but as
"its coming to Montreal would have brought it to a place
"where practically there was no market for it, we were
"obliged or considered ourselves entitled to deal with it
"apart from any question of legal rights on an equitable
"basis. We consequently arrived at a settlement as
"nearly mutually satisfactory as we could.

"Q. When that sugar came there did you think it was
"yours or theirs? A. It was theirs" (*Drummond, fols.* 114, 116).

The bills of lading of the *Tiber* under which the sugar was delivered in Montreal bear the endorsement of the "Atlantic Mutual Insurance Company by A. A. Raven, "Second Vice-President" (*Exhs.* 17, 18, 19).

If the libellant had declined to handle the sugar when it came to Montreal, the situation was such that they could legally have insisted that an abandonment had been made and accepted, and they could have collected a total loss from the Atlantic Mutual.

Both parties recognized this, and accordingly an adjustment was made not upon surveys or upon any exact lines, but of a generally equitable character, by which, as the libellant alleges in its libel, it received the sugar "on account of and in part payment for the loss" (*Libel, Art. 7, fol. 17*).

Certainly the respondent, who was not in any event entitled to an abandonment, has no right to question the position. The only right the libellant could possibly have had would be to intervene, pay the entire loss of the Atlantic Mutual, all the expenses of salvage and forwarding, a total loss under libellant's insurance upon profits, and take possession of the saved cargo.

Its only possible right, and this right is by no means admitted, therefore, was to pay losses and expenses aggregating over $190,000, and to acquire title to sugars worth "about $20,000."

Naturally the respondent had no desire to make such intervention, though its agent in Montreal received "from time to time" all the information which the libellant had as to the position of the vessel and cargo (*Drummond, fol. 114*).

Fifth.

ALL THE EQUITIES OF THE SITUATION ARE IN FAVOR OF THE LIBELLANT.

Not only has there been literally, in accordance with the terms of the certificate, a "total loss" of the profits, but there has been a total loss of the profits on every grain of the sugars, through perils insured against.

While a small portion of the sugars reached destination,

the circumstance was accomplished only by artificial measures and by extraordinary expenditures.

In respect of the sugars so delivered, the title to an undivided one-half had passed from the libellants to the salvors by virtue of Captain Rouse's agreement, and had passed from the salvors to the Atlantic Mutual by sale and purchase, and after being so vested in two strangers, came back to the libellant only by virtue of a "settlement" with the Atlantic Mutual (*Drummond, fol.* 105).

Instead of the value of $181,000, which is admitted to have existed upon the day the respondent wrote its insurance (*Libel, Art.* 5, *fol.* 10; *Ans., Art.* 4, *fol.* 62), there remained a net value in Montreal of not over $7,000, to which the Atlantic Mutual was entitled, and in respect of which it had in fact practically accepted an abandonment.

The respondent made insurance upon the "profits" of the cargo, the only limitation being "against total loss only."

There is a provision which is commonly inserted in policies upon profits, and which Mr. Phillips thinks is quite essential for the protection of the underwriter. He refers to it as follows:

> "It accordingly appears to be quite necessary, in such "a policy, to stipulate for a settlement of loss and claim "for return of premium, in the same manner as on the "goods, or to make some other agreement to avoid uncer-"tainty."
>
> *Phillips on Ins., Sec.* 1242.

This is practically accomplished by underwriters stamping the policy or certificate of insurance with these words or words equivalent thereto:

> "This company is liable only for the same proportion of "loss on profits that it would be under this policy, on the "merchandise from which the profits accrue and is entitled "to the same salvage."

The respondent did not so stamp its policy or certificate, and it is to be presumed that it received a due consideration in the way of premium for omitting such stamp.

It should have contemplated, and probably did contemplate, for it is an intelligent insurer, the responsibility imposed upon it by the insurance which it made.

It cannot claim exemption, after a loss occurs, which the contract of insurance does not give it.

Sixth.

THE UNITED STATES CIRCUIT COURT OF APPEALS HAVE ERRED IN HOLDING THAT THERE MUST BE AN ABSOLUTE AND ENTIRE LOSS OF CARGO IN ORDER TO EFFECT A TOTAL LOSS OF PROFITS.

There is no authoritative judicial decision in the United States distinguishing between a constructive total loss on cargo or vessel and a constructive total loss on profits.

The rule that a fifty per cent. loss affords sufficient foundation for a constructive total loss of either vessel or cargo is well established. There is no rule requiring a broader basis for a constructive total loss of profits.

The English rule, which is more onerous upon the assured than the American rule in the measure of a constructive total loss on vessel and cargo, admits a total loss of profits when, in ordinary parlance, the profits have been eaten up or consumed by a marine peril, even though the subject matter out of which the profits grew continues to exist. Thus, in a case where profits of the charter were insured "warranted free from all average," which is the equivalent to insurance against "total loss," the plaintiffs having chartered a steamer for a lump sum, took on a general cargo at freights aggregating several hundred pounds more than the charter hire, and insured the surplus as profits. A certain portion of the cargo, being damaged by marine perils, was ruined and the freight thereon lost. As a result the freights actually collected were less than the charter hire. It was held that there was a total loss of profits (*Asfar & Co.* vs. *Blundell, L. R.*, 1 *Q. B.*, 1895, 1896, p. 123).

The United States Circuit Court of Appeals hold in effect not only that such a rule is bad, but it holds that a constructive total loss of cargo does not carry with it a total loss of profits; and go further, and holds that *if any item of the cargo survives*, even in a damaged condition, there can be no total loss of profits.

There is some uncertainty among text writers as to what constitutes a total loss of profits, but no text writer has intimated any such rule as is laid down by the United States Circuit Court of Appeals.

Mr. Parsons argues that the necessity which rests upon the assured of transferring by abandonment to the underwriter on cargo the remnant of goods saved in order to constitute a constructive total loss, creates an inability on the part of the assured to make any abandonment to the underwriter on profits; and that, therefore, there can never be a constructive total loss of profits.

Parsons on Maritime Law, Vol. II., pp. 394, 395.

Mr. Phillips make a similar suggestion in his work.

Phillips on Insurance, Section 1503.

The intimations of these writers relate, however, to instances where some portion of the cargo has come through to destination undamaged and without extraordinary charges, so that there exists an *actual profit on such portions of the cargo*, which profit the assured is compelled to surrender to his underwriter on cargo in order to claim a total loss.

The United States Circuit Court of Appeals has failed to note the reservations of these writers, and has applied their intimations to the case at bar without observing that *there was no particle of profit attaching to any portion of* the remnant of sugars *that arrived* in Montreal. The profit had been consumed by the breaking up of the sugars, by the physical damage through wet, and by the expenses of salvage.

The only judicial decision in the United States upon the question, is that of Mr. Justice Kent in *Abbott* vs. *Sebor.*

This opinion is opposed to the views of the text writers above referred to, but was accepted in this case by the District Judge, as authoritative.

Mr. Justice Kent said:

> " What shall be the criterion of an average or a
> " total loss, in respect to profits, I cannot at
> " present with clearness decide. Perhaps the es-
> " tablished rule, in respect to ship and cargo, of a
> " loss of more or less than half the subject in value
> " may be applicable. If so, the question here will
> " be whether the more profitable half of the cargo
> " might not have been brought in the same ship to
> " New York. I suggest this as a rule that may,
> " perhaps, supply."
>
> *Abbott* vs. *Sebor*, 3 *Johnson's Cases*, 39, 46.

In the case at bar, less than one-eighth of the cargo reached destination. Suppose there had been no insurance on cargo, but only the profits over and above the value of $166,145. Suppose that the original sea carrier had forwarded this fragment of sugar through to destination, and delivered it—not from the original carrying vessel, but from a forwarding vessel—to the consignee. The delivery would have been burdened with salvage liens of fifty per cent., and liens for other expenses of fully fifteen per cent. The net value delivered to the consignee would be $7,000 against interest valued by the insurer of profits at $166,145. The $7,000 would not have represented sound sugar unencumbered with liens; it would represent merely an equity under the burden of salvage and kindred expenses.

It is upon this point of fact, undisputed fact, that the United States Circuit Court of Appeals have erred. They are at direct issue with the learned District Judge; they are at direct issue with the only other American authority; they are at direct issue with the English authorities. Their conclusion is based upon the error of assuming that the libellant received any portion of profits. They say, in their decision:

> " By the decree of the Court below, the libellant
> " has been awarded a recovery which, if collected,
> " would put into this object *the profits realized on*

> " *the cargo saved* in addition to the amount of the " respondents' policy. Irrespective of this consid- " eration, and *because it has received the profits on* " *a part of the cargo*, we are of the opinion that " there has not been a total loss of profits within " the meaning of the contract " (*Opinion, fol.* 501).

While the decision is in form double-headed, both heads depend for life upon the single incorrect proposition that the libellant has received profits on any portion of the cargo. This error is not based upon any dispute of facts, because there is not a single disputed fact in the whole record; but upon a pure misunderstanding of the situation.

The gross value of the sugars which reached Montreal was admittedly "about $20,000" (*Libel, fol.* 18; *Answer, fol.* 67). In taking them over from the Atlantic Insurance Company, the libellant allowed the Atlantic Insurance Company, $23,396.19—a valuation fixed, in view of the damaged condition and broken assortment of the sugars. It was a fair valuation, and equitably arrived at. It was certainly a full valuation.

The libellant received simple indemnity from the Atlantic Mutual Insurance Company, his loss being paid by sugars valued at $23,396.19, and cash $142,748.81, making a total of $166,145, the amount insured.

While this Court has never passed directly upon the point at issue in this action, it has held that insured profits are recoverable even though they are not tangibly earned and merely awaiting realization, as they were in the case at bar, but are mere expected profits. Thus, where a shipowner starting his vessel off as a trader upon a long round voyage insured the expected profits of the venture in the valued sum of $20,000, and the vessel was lost with her cargo before she passed the first stage of her voyage, a full recovery was permitted, without any proofs that profits would have been realized if she had not met disaster.

Patapsco Ins. Co. vs. *Coulter*, 3 *Peters*, 221.

In an early English case it was held that the breaking up of a voyage through the loss of a vessel, the cargo being entirely saved and reaching destination, constituted of itself a total loss of profits, the theory being that the merchant was entitled to a delivery at destination from the vessel in which the goods had been shipped.

Barclay vs. *Cousins*, 2 *East.*, 544.

Seventh.

IT IS RESPECTFULLY SUBMITTED THAT A WRIT OF CERTIORARI SHOULD BE GRANTED, DIRECTED TO THE HONORABLE JUDGES OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND JUDICIAL CIRCUIT, COMMANDING THEM FORTHWITH TO CERTIFY AND RETURN TO THIS COURT ALL OF THE PROCEEDINGS BY THEM HAD ON THIS CASE.

BUTLER, NOTMAN, JOLINE & MYNDERSE,
Proctors for the Petitioner.

WILHELMUS MYNDERSE,
Advocate.

No. 149.

Supreme Court of the United States

October Term, 1894.

THE CANADA SUGAR REFINING COMPANY,

Libellant and Petitioner,

vs.

THE INSURANCE COMPANY OF NORTH AMERICA,

Respondent.

Brief for Libellant and Petitioner

WILHELMUS KINDERSLEY,

Advocate.

Supreme Court of the United States.

THE CANADA SUGAR REFINING COMPANY, LIMITED, *Libellant and Petitioner,*	
against	No. 290.
THE INSURANCE COMPANY OF NORTH AMERICA, *Respondent.*	October Term, 1898.

Brief for the Libellant and Petitioner.

This action comes on for hearing upon a writ of *certiorari* issued by this Court to the United States Circuit Court of Appeals for the Second Circuit (*Record, p.* 82).

The action was originally instituted in the District Court of the United States for the Southern District of New York by the libellant, the Canada Sugar Refining Company, Limited, against the respondent, the Insurance Company of North America, to recover insurance effected by the libellant with the respondent in the amount of $15,000 "on profits on a cargo of sugar. Against total "loss only. Valued at sum insured. Shipped on board "the British ship *John E. Sayre*, at and from Iloilo to "Montreal."

The libellant filed its libel on the 27th of November, 1894, and the cause was tried in December, 1896, resulting in a decree in favor of the libellant against the respondent for the full amount of the insurance, with interest and costs (*Opinion, pp.* 73, 74; *Decree, p.* 75).

Upon an appeal taken by the respondent, the United States Circuit Court of Appeals directed that the decree of the District Court be reversed and the libel dismissed (*Opinion, pp.* 77–81), and entered an order accordingly April 23, 1898 (*Order, p.* 81).

Upon the petition of the libellant this Court on the 10th day of May, 1898, issued its writ of *certiorari* to the Judges of the United States Circuit Court of Appeals, under which writ the record and proceedings in the cause have been duly filed (*Writ of Error, p.* 82).

Statement of Facts.

The libellant is a Canadian corporation, and has a factory for the refining of sugar in Montreal, Canada.

The respondent is a Pennsylvania corporation, engaged in the business of marine insurance.

The libellant claims from the respondent $15,000, with interest, as a total loss under a certificate of insurance issued by the respondent "on profits on cargo of sugar" shipped on board the *John E. Sayre* at Iloilo to Montreal.

In the latter part of December, 1892, the libellant purchased by cablegram from Kerr & Company, of Iloilo, in the Philippine Islands, a cargo of sugar to be shipped on the *John E. Sayre*, of "usual assortment" at an agreed price per ton. The cargo was to be paid for by a credit granted by the Bank of Montreal (*Drummond, pp.* 12, 14). The quantity purchased was to depend upon the amount the ship could carry.

This quantity being at the time unknown, the libellant applied to the Atlantic Mutual Insurance Company on December 9, 1892, for insurance on the shipment at the rate of $6.50 for each pound sterling of invoice value (*Drummond, p.* 13). This valuation of the pound sterling at $6.50 is a common rate for insurance purposes, and is intended to protect the insured not merely in respect of invoice cost, but also in respect of the cost of credit, cost of insurance and interest until arrival (*Drummond, pp.* 13, 19).

The Atlantic Mutual accepted the application subject to a stipulation that the total insurance should not exceed

$185,000, the limitation being due to the fact that the capacity of the ship was not known (*Drummond, p.* 13).

Iloilo sugars are in three grades, No. 1, or A, being the most valuable, No. 2, or B, being next in value, and No. 3, or C, being the lowest in value. They are sold in the market under a description of "usual assortment," which means that the shipment shall be made up one-eighth of No. 1, or A, two-eighths of No. 2, or B, and five-eighths of No. 3 or C. The price is an average price for the whole shipment based upon such assortment (*Drummond, p.* 16).

The sugars were loaded at Iloilo on the *John E. Sayre* in January and February, 1893, and the shipment, when completed, was made up of 73,089 mats, weighing 39,360 piculs, or 2,460 tons (*Bills of Lading, Exhs. A, B, C, pp.* 46, 47; *Invoices, Exhs.* 1, 2, 3, *pp.* 38, 39).

There were 9,561 mats of No. 1 sugar, 17,614 mats of No. 2, and 45,914 mats of No. 3, thus assuring substantially the "usual assortment" (*Bills of Lading, Exhs. A, B, C, pp.* 46, 47; *Invoices, Exhs.* 1, 2, 3, *pp.* 38, 39). The invoice value was £22,152 13s. 8d. (*Invoices, Exhs., pp.* 38, 39).

The *John E. Sayre* sailed from Iloilo, February 10, 1893, bound to Montreal (*Rouse, p.* 20).

By the bills of lading the sugars were consigned to the order of the Bank of Montreal, and were taken up by the libellant from the Bank of Montreal on paying the credit through which the sugars had been purchased (*Drummond, p.* 13).

While the sugars were at sea there was a decided increase in market values; and the libellant accordingly applied to the Atlantic Mutual on March 30th for additional insurance. This was granted by increasing the valuation of the pound sterling from $6.50 to $7.50 (*Drummond, p.* 13). This arrangement was finally evidenced by the Atlantic Mutual issuing a policy upon the sugars to the libellant in the latter part of April, by which time the quantity and invoice value of the shipment was known, in the amount of $166,145, being at the rate of $7.50 for each pound sterling of the invoice value (*Drummond, pp.* 13, 14). The policy bore date December 10, 1892,

which was the date of the original application for insurance (*Policy, p.* 42).

The increased amount of insurance proving still insufficient to cover the sugars at the existing market valuations, the libellant effected other insurance with the respondent, upon its profits, in the valued sum of $15,000 (*Drummond, p.* 14).

This insurance was made April 29, 1893, and at the time of making it Mr. Drummond informed the respondent that the Atlantic Mutual had issued a policy of $166,145 on the sugars (*Court Minutes of Trial, Record, p.* 11).

The insurance certificate issued by the respondent reads:

"INSURANCE COMPANY OF NORTH AMERICA, PHILADELPHIA.

"This is to certify that on the 29th of April, 1893, this "Company insured under policy No. 117,407, made for "Robert Hampson fifteen thousand dollars on profits on "cargo sugar. Against total loss only. Valued at sum "insured. Shipped on board of the British ship *John* "*E. Sayre* at and from Iloilo to Montreal. And the loss, "if any, subject to the terms and conditions of the "policy, has been made payable to the order of Canada "Sugar Refining Company, Limited, on surrender of this "certificate" (*Exh.* 4, *p.* 40).

This certificate was signed by the Vice President and by the Secretary of the respondent, and was countersigned by the Montreal agent, Robert Hampson, under whose open agency policy the certificate was issued.

On July 4th, while prosecuting her voyage, the *John E. Sayre* encountered heavy fog, and two days later, during the continued prevalence of the fog, stranded on the coast of Newfoundland, a little east of Port au Basque harbor, the nearest settlement being Channel (*Rouse, p.* 21; *Pike, 3d Int., p.* 33).

The shore was rocky and the coast was dotted with "terrible reefs," upon which the ship ran at high tide (*Rouse, p.* 21).

The position of the vessel was one of danger, and the crew abandoned her (*Rouse, pp.* 21, 22). The master

alone remained on board with salvors who came to his assistance, fishermen of the neighborhood (*Rouse, 5th Int.*, *p.* 33).

There was no possibility of saving the vessel, but the master agreed with the salvors to save such cargo as they could. The agreement was that " they were to get half of what they saved " (*Rouse, p.* 22) which appears subsequently to have been modified as to a small portion of the cargo to an agreed compensation of one cent a pound (*Pike 5th Int , p.* 33).

There was a heavy surf running, and the work had to be done in small boats. The fishing boats could not approach within a mile (*Rouse, p.* 22). Water soon flooded the lower hold, destroying the cargo there. The salvors were able to save from the between-decks about three hundred tons of sugar, some of which was considerably damaged (*Rouse, p.* 22; *Pike, p.* 33; *Exhs.* 18, 19, *pp.* 67, 68; *Harvey, Exhs.* 15, 16, *pp.* 64, 65).

The saving of the cargo continued until some time on the 8th of July, when work was finally abandoned (*Pike, p.* 33). The ship became a total loss, her wreck being sold for $170 (*Rouse, p.* 24).

On the evening of July 8th Mr. Pike, representing Harvey & Co., of Newfoundland, agents of the Atlantic Mutual Insurance Company, arrived in Channel in the interests of that company (*Pike, p.* 33). He found that a portion of the saved sugar was in store, and the remaining portion was still on the fishing boats. He at once took charge of the situation and relieved the master of the vessel from further responsibility. He paid to him $200 in cash previously disbursed by him, and under instructions from the owner, the master turned the cargo over to Mr. Pike and left it in his charge (*Rouse, pp.* 23, 25; *Pike, 6th, 7th, 8th Ints., pp.* 34, 35).

Mr. Pike, in the course of the following days, adjusted the claims of the salvors. He observed the agreement which had been made with them by the master of the *John E. Sayre*, which was as to the greater portion of the cargo that they should receive " half of what they saved." The portion thus affected weighed net 319 tons 3 cwt. 0 qr. 14 lbs.; and of this there was accordingly apportioned

and set off to the salvors 159 tons 11 cwt. 2 qrs. and 7 lbs. (*Pike, p.* 33; *Exh.* 2, *p.* 71; *Harvey, Exh.* 15, *p.* 64). Nearly all of the sugars thus given to the salvors were subsequently purchased from them by Mr. Pike for the Atlantic Mutual, at prices ranging from one-half of a cent to two and a half cents per pound, according to condition, about 350 bags being wet. One salvor, however, preferred to retain a small part of his share in kind (*Harvey, Exh.* 15, *p.* 65). The amount of money paid on such purchases aggregated $8,077.51 (*Harvey, Exh.* 15, *p.* 64).

The portion saved under the agreement for payment at the rate of one cent a pound was found by Mr. Pike to weigh only 15 tons 9 cwt. 1 qr. and 13 lbs., in respect to which he paid the salvors $346.39. This cargo was all "more or less damaged in the boats" (*Pike, Exh.* 3, *p.* 72; *Harvey, Exh.* 16, *p.* 65).

The Atlantic Mutual paid to the shipowner his ocean freight and took over the possession of the cargo (*Rouse, p.* 24; *Drummond, p.* 17).

Mr. Pike, after adjusting accounts with the salvors and purchasing their shares of the sugar, reconditioned portions of it, procuring 200 new bags, and then shipped it to Montreal on the coasting steamer *Tiber* (*Harvey*, 10*th Int.*, *p.* 36; *Pike*, 10*th Int.*, *p.* 36). The shipment was made in the name of Harvey & Co. as shippers, and the sugar was consigned at Montreal to the "Atlantic Mutual Insurance Company" (*Harvey*, 10*th Int.*, *p.* 30; *Bills of Lading, Exhs.* 17, 18, 19, *pp.* 66, 67, 68; *Pike*, 10*th Int.*, *p.* 36; 5*th Cross-Int.*, *p.* 37; *Drummond, pp.* 17, 19).

These bills of lading covered 9,179 sacks of dry sugar and 845 sacks of wet sugar. The weight of the dry sugar was 307 tons 14 cwt. 1 qr. The weight of the wet sugar waa 26 tons, 8 cwt. no qrs. 18 lbs. (*Bills of Lading, Exhs.* 17, 18, 19, *pp.* 66, 67, 68).

The total expenses incurred by the Atlantic Mutual Insurance Company in Newfoundland, through Harvey & Co., in respect of the salvage and of the care, reconditioning and forwarding of the sugars, amounted to $10,167.64 (*Harvey* 8*th Int.*, *p.* 29; *Exh.* 16*a*, *p.* 66). These figures do not include the ocean freight, nor the freight from Newfoundland to Montreal.

The libellant had nothing to do with the handling of the sugars in Newfoundland, nor with the negotiations with the master of the vessel respecting surrender of the sugars there, and was not consulted in any way in those transactions (*Drummond, pp.* 17, 19; *Harvey, 6th Cross Int., pp.* 31, 32; *Pike, 6th Cross-Int., pp.* 37, 38).

Upon arrival of the sugars in Montreal the Atlantic Mutual sent an agent, Mr. Darragh, to receive them. He entered into negotiations with the libellant with the view of their taking delivery of the sugars, and with the result that the libellant finally accepted them "on a settlement "at approximately the insured value" (*Drummond, pp.* 16, 17).

The bills of lading under which the sugars had been shipped on the *Tiber* were endorsed by "The Atlantic Mu- "tual Insurance Company per A. A. Raven, Second Vice- "President" (*Bills of Lading, Exhs.* 17, 18, 19, 66, 67, 68), and with these in his hands Mr. Darragh secured delivery of the sugars from the *Tiber* and turned them over to the libellant (*Drummond, pp.* 16, 17).

On the settlement between the libellant and the Atlantic Mutual the libellant paid the *Tiber's* freight of $4 a ton, and allowed to the Atlantic Mutual the difference between that freight and the freight paid by the Atlantic Mutual to the *John E. Sayre* (*Drummond, p.* 17).

In taking over the sugars no attempt was made to ascertain how far the original "assortment" had been disturbed, it being impracticable to determine that fact; and no attempt was made to measure accurately the damage that had come through the wetting of the sugars (*Drummond, p.* 16) They were taken over in their existing grades, condition and quality at substantially the value insured in the Atlantic as being a "fairly equitable basis," there being no market value for raw sugars in Montreal (*Drummond, pp.* 16, 18).

The libellant had learned through the newspapers, on July 7th, of the stranding of the *John E. Sayre*, and reported the fact by telegraph at once to the Atlantic Mutual (*Drummond, p.* 15), who, on the same day, wrote to the

libellant, acknowledging receipt of the information, and saying they had previously received word through other channels, and had put the matter in the hands of Harvey & Co., of St. Johns, Newfoundland (*Drummond, p.* 15; *Exh.* 5, *p.* 40).

Under date of July 10th the Atlantic Mutual wrote to the libellant:

"Our latest information is that all the sugar between-
" decks has been saved, and we hope to arrange to have it
" sent to Montreal" (*Exh.* 6, *p.* 41).

On July 14th the libellant learned of sugars being offered for sale in Montreal, and telegraphed to the Atlantic Mutual as follows:

"Sugar supposed *ex John E. Sayre* being offered here
" by brokers representing Newfoundland parties" (*Drummond, p.* 15).

It confirmed the telegram by a letter of the same date, in which it wrote:

" We have within the last day or two been repeatedly
" asked to offer for sugar by Newfoundland parties.
" To-day an inquiry was received for our best price for
" about 200 tons Iloilo sugar *ex John E. Sayre* from Archi-
" bald & Co., North Sydney.
" We gave no answer to these persons, but advise you
" by telegram that your local agent in North Sydney may
" protect your interests" (*Exh.* 6*x*, *p.* 41).

In acknowledging receipt of the telegram the Atlantic Mutual wrote:

" The master of the vessel agreed with salvors to give
" them one-half of the sugar saved as salvage, and our
" correspondents at St. Johns offered to purchase their
" half and forward the whole to Montreal. It is quite
" likely that the salvors, not satisfied with the offer made
" to them, are endeavoring to ascertain whether more
" money cannot be made by selling their share of the
" sugar in Montreal" (*Exh. No.* 8, *p.* 42).

During the progress of these events the libellant gave to Mr. Hampson, the Montreal agent of the respondent,

all the information it had. The position of the vessel and the cargo was discussed with him by Mr. Drummond upon the information then in Mr. Drummond's possession, and everything that became known to the libellant was communicated from time to time to this agent (*Drummond*, *p.* 18).

Upon these facts the libellant claimed a total loss from the Insurance Company of North America under the insurance of profits. Upon the claim being questioned, formal proofs of loss were served August 23, 1894 (*Ex.* 10, *pp.* 43-54).

The considerable delay was due to the long consideration given to the claim by the respondent before finally rejecting it (*Art.* 8, *Proofs of Loss*, *pp.* 45-46).

POINTS.

First.

THE ONLY PROFITS TO BE CONSIDERED ARE THOSE IN EXCESS OF THE VALUE OF $166,145 INSURED BY THE ATLANTIC MUTUAL INSURANCE COMPANY UPON THE CARGO.

When the respondent issued its certificate of insurance on profits, the existing value of the cargo was "about $181,000." This is alleged in the libel (*Libel*, *Art.* 5, p. 2), and the respondent in its answer admits that "at the "time of such insurance the value of the said sugar, ex- "clusive of freight, was about $181,000" (*Ans.*, *Art.* 4, *p.* 9).

At the time of making insurance with the respondent, Mr. Drummond, the president of the libellant, informed the respondent's agent that the sugar itself was insured in the amount of $166,145 in the Atlantic Mutual (*Court Minutes of Trial*, *December* 7, 1896; *Record*, *p.* 11).

The fact was therefore recognized at the time that the libellant's existing profits were about $15,000 in excess of

the amount insured by the Atlantic Mutual, and the respondent thereupon issued its policy on such profits "valued at sum insured."

This circumstance may become material in two aspects:

A. If it becomes necessary to consider, in determining whether or not abandonment was essential, what profits, if any, survived the disaster, we shall need to have a true basis of original value for computing such profits. Such basis, so far as the respondent is concerned, is $166,145, the value insured on the cargo by the Atlantic Mutual. The profits over and above that amount are what were insured by the respondent. It does not concern them when or how or at what price the libellant first acquired the sugars. The price paid by the libellant to Kerr & Company, as represented by the invoices, is no more material to the respondent than would be the cost of raising the sugar if the libellant had raised it on his own plantation.

When the respondent issued the certificate of insurance the two interests of the libellant were defined—one at $15,000 as libellant's profits in the sugar, and the other at $166,145, representing its principal value.

B. If the question arises as to whether there was a loss of profits through the disaster. This is scarcely a possible contingency, inasmuch as the profits were valued in the policy or certificate.

Second.

THERE WAS AN ABSOLUTE AND ACTUAL TOTAL LOSS OF PROFITS, IN RESPECT OF WHICH THE LIBELLANT IS ENTITLED TO RECOVER THE FULL AMOUNT INSURED.

It is important to note the phraseology of the certificate of insurance. It is for

"$15,000 on profits on cargo sugar. Against total loss "only" (*Cert. of Ins., Exh.* 4, *p.* 40).

These words are not ambiguous, and the only natural construction is that the insurance is made against the total loss of *profits*. Whether this was wise insurance or not for the respondent to make is another question. But it has assumed its risks and should have contemplated, before issuing the certificate, just what it was insuring.

The responsibility of the respondent is not conditioned upon a total loss of cargo, but upon a total loss of profits.

While insuring against "total loss" renders the insurer liable for a "constructive total loss," the question will for the present be treated as though such insurance protected the insured only in respect to an "absolute total loss" or "actual total loss."

From every point of view there was an actual or absolute total loss of profits.

A.—The original prime cost of the shipment was £22,-152 13s. 3d, (*Drummond, p.* 12, *Exhs.* 1, 2, 3, *pp.* 38, 39), or about $110,000. The value of the sugars which reached Montreal was "about $20,000" (*Libel, Art.* 7, *p.* 3; *Ans., Art.* 6, *p.* 10). This was their gross value on arrival in Montreal, without deductions for the extraordinary expenditures made for salvage, storage and forwarding, aggregating $11,500 (*Harvey, Exh.* 16*a*, *p.* 413–415), or for the ocean freight paid by the Atlantic Mutual to the owners of the *John E. Sayre*, the amount of which is not exactly known (*Rouse, p.* 24).

Not only were there no profits, but there was an enormous loss.

B. If the proceeds of the voyage are compared with the value of $166,145, designated as the basis of value at the time the respondent's insurance on profits was made, the disappearance of profits is still more conspicuous.

C. Treating the arrived portion of the cargo by itself, the same result is reached—the total disappearance of profits, either on the basis of the invoice value of the cargo or on the basis of the insured value of the cargo.

The amount of cargo that reached Montreal was about

325 tons net (*Libel, Art.* 7, *p.* 3; *Ans., Art.* 6, *p.* 10; *Drummond, p.* 16; *Harvey, Exhs.* 17, 18, 19; *pp.*66, 67, 68).

The shipment had originally weighed about 2,460 tons (*Rouse, p.* 20); so that only about one-eighth of the cargo reached destination. Such remnant came to Montreal in a broken "assortment," and a considerable portion of it in a damaged condition (*Drummond, p.* 16; *Harvey, Exhs.* 17, 18, 19, *pp.* 66, 67, 68; *Pike, p.* 33). Its value in this condition, freight paid, was admittedly "about $20,000" (*Libel, Art.* 7, *p.* 3; *Ans., Art.* 6, *p.* 10), to preserve which value expenditures for salvage, storage and forwarding had been incurred in the amount of $11,500, leaving a net value (without consideration of ocean freight) of about $8,500.

Assuming that the libellant had no insurance on the cargo, it would have found the proceeds of the arrived cargo, after payment of ocean freight, only about $7,000.

The original value of these 325 tons, based upon the invoice value of £22,152 13s. 3d., was about $15,000; and based upon the insured value of $166,145, was about $22,000.

D. If we look at the matter still more critically and consider each bag of sugar or each pound of sugar by itself, and treat the profit insured thereon as being a "mere excrescence" or "incident" to the cargo, it was absorbed and extinguished when Captain Rouse made his agreement with the salvors that they should have half of what they saved.

The profits insured by the respondent were only about nine per cent of the value of the cargo, being only $15,000, while the cargo was insured for $166,145. The salvage was fifty per cent. and under the particular form of Captain Rouse's agreement with the salvors, one-half of every bag, *one-half of every pound of the cargo belonged to the salvors.* The agreement which he made with them was, in the first instance, that they were "to get half of what they saved" (*Rouse, p.* 21; *Pike, p.* 23). His agreement was carried out literally and fairly by the representative of the Atlantic Mutual. He caused the sugar to

be weighed in the presence of the salvors and set off their half to them (*Pike, pp.* 33, 34; *Exh.* 2, *p.* 71), and then later purchased "the portion of the salvors" at rates varying from one-half a cent to two and a half cents a pound, according to its condition (*Pike, p.* 35; *Exh.* 2, *p.* 71; *Harvey, Exh.* 15, *p.* 64).

A small portion of the sugar was saved under a some what different but more onerous contract with the salvors, the stipulated payment being one cent a pound. As all this portion of the cargo was wet (*Pike, Exh.* 3, *p.* 72; *Harvey, Exh.* 16, *p.* 65), the compensation of the salvors was heavier than under the original arrangement. The modification related only to the last fifteen tons that came from the wrecked vessel (*Pike, Exh.* 3, *p.* 72).

The particular form of the agreement with the salvors is material in more aspects than one; and *the attention of the Court is therefore attracted to the circumstance that as each pound of sugar reached the Newfoundland shore an undivided one-half interest therein, or a still greater interest, belonged to the salvors.*

A recent English case was for £2,000 "on profit on "charter * * * warranted free from all average," which is the equivalent of insurance against actual total loss.

The plaintiffs chartered the steamer *Govino* for a lump sum of £3,900, and offered her for general cargo in the Persian Gulf. While in the course of loading, and before knowing just what their profits would be, they insured them as above for £2,000. Upon completion of loading the freight under bills of lading aggregated £4,690, showing a profit to the charterers of £790. The vessel sailed for London, the port of destination, and while in the course of discharging her cargo there was collided with by another vessel and was sunk.

Thereby, a considerable portion of her cargo consisting of dates was ruined, and the freight, which would have been earned on delivery of the dates, was lost.

The result was that the freight actually collected in London from the sound cargo was less than £3,900.

The Court held that the loss on profits was total, the

returns from freight being insufficient to meet the charter hire. Judgment was given, therefore, for £790.

Asfar & Co. vs. *Blundell, Law Rep.*, 1 *Q. B.*, 1895–1896, *p.* 123.

This case fully sustains the libellant's contention that there was a total loss of profits in every sense of the word, actual as well as constructive, when the value of the outturn in Montreal (which in gross was only $20,000) did not equal the amount of the original invoice values, which were in fact about eight times the saved value.

Third.

THE LOSS OF THE CARGO AND THE EXPENSES INVOLVED IN FORWARDING THE SAVED PORTION TO MONTREAL ENTITLE THE LIBELLANT TO RECOVER AS FOR A TOTAL LOSS.

There are three well defined grades of insurance applicable to any subject of marine insurance, to wit, insurance against "partial loss," against "total loss," and against "actual" or "absolute total loss."

Insurance which protects against partial loss gives to the assured the right to reimbursement in respect of any damage or detriment that may come to the injured property through marine perils.

Insurance against total loss entitles the insured to recover the entire insurance upon establishing a constructive total loss.

When insurance is made against actual or absolute total loss only, then the subject of insurance must be annihilated.

Insurance under the phrase "total loss" simply is satisfied by a constructive total loss with a seasonable abandonment.

Arnould on Marine Ins, 952.
McArthur on Marine Ins., 275.
Lowndes on Marine Ins., 132, 133.
Parsons on Maritime Law, Vol. II., 338-341.
Phillips on Ins., Secs. 1485, 1487.

If the underwriter desires to protect himself from liability for a constructive total loss, he makes his insurance to read "against actual total loss only," or "free from all average."

Monroe vs. *B. & F. Marine Ins. Co.*, 51 *F. R.*, 777.
Burt vs. *Brewers & Malsters' Ins. Co.*, 52 *N. Y.*, 400.
Carr vs. *Security Ins. Co.*, 109 *N. Y.*, 504.

A "constructive total loss" of a vessel or cargo occurs when more than fifty per cent. of its value has been destroyed.

Phillips on Ins., *Sec.* 1608.
Parsons on Maritime Law, *Vol. II.*, 371.
Heebner vs. *Eagle Ins. Co.*, 10 *Gray*, 131.
Green vs. *Pacific Ins. Co.*, 9 *Allen*, 217.
Snow vs. *Union Mut. & Mar. Ins. Co.*, 119 *Mass.*, 592.

The cases cited in the lower courts by the counsel for the insurers in support of his view that there cannot be a constructive loss of cargo, do not sustain him.

In the case of *Burt* v. *The Brewers and Malsters' Ins. Co.*, 78 *N. Y.*, 400, the insurance was specifically against "actual total loss" only, and of course no question of constructive total loss could arise thereunder.

In the case of *Chadsey* vs. *Guyon*, 97 *N. Y.*, 333, the cargo was warranted by the assured free from particular average. The subject of insurance was a shipment of potatoes in barrels, and the question considered by the Court was whether the insurance could be apportioned and made applicable to each barrel of potatoes, thus permitting the assured to recover in respect of a total loss of part.

In the case of *Humphrey* vs. *The Union Ins. Co.*, 3 *Mason*, 440, the subject of insurance was a cargo of lemons and oranges in boxes insured under the memorandum clause, free from particular average. The oranges were destroyed, while the lemons sustained comparatively slight damage, and the question was whether a recovery could be had for a total loss of part.

But to entitle the assured to recover his full insurance upon a constructive total loss, he must ordinarily make a timely abandonment to his underwriters. This is so in respect of insurance upon a vessel or of insurance upon cargo.

An abandonment, however, is not always necessary, nor even proper, in the case of insurance upon profits.

The latest English writer says:

"Notice of abandonment of profits may sometimes be "necessary. If there is no valid insurance on the goods "so that no abandonment could be made to the under- "writers on goods, a notice of abandonment should be "given in any case where it would be required with refer- "ence to the goods if the goods were insured. It is better "to give notice of abandonment in any case where the "goods are not totally destroyed."

Tyser on Mar. Ins. Losses, Sec. 109.

This is in acord with our own writers and our own decisions to the effect that an abandonment of profits is not necessary or proper when there is an insurance upon the goods themselves, for the reason that the insurer on goods has a right to a complete and absolute abandonment of the cargo with all of its increments and incidents.

"Profits are so far distinct from cargo that if both are "insured it is said that there may be a several abandon- "ment of each. But it is not easy to see how anything "can pass by the abandonment of profits. For the in- "surers on goods take by the abandonment to them "everything on which profits have been made, or can be "made or saved."

Parsons on Maritime Law, Vol. II., 394.

"A policy upon expected profits does not seem to offer "anything upon which an abandonment can operate. "And it does not appear from any speculation or any "judicial opinion relating to this subject which has come "to my knowledge that an abandonment of this interest "can be of any importance to the underwriters, other- "wise than as a notice that a total loss is claimed; and if "this is its only effect an abandonment is not necessary. "* * * It does not appear, therefore, that an abandon- "ment of profits can be anything more than a nugatory "ceremony."

Phillips on Insurance, Sec. 1503.

"But admitting that this is to be regarded as a valued "policy, it is said that the assured by abandoning the "cargo to its underwriters has put it out of the power "of the defendant to receive any salvage on the profits, "and that, therefore, he (the assured) has no right to re- "cover in this suit. This is a dilemma which the defend- "ant ought to have foreseen at the time of his subscrip- "tion; he must have supposed there was a policy on the "cargo which in case of disaster would naturally be "abandoned to those who had insured it. It is idle to "complain of what must have been clearly his own un- "derstanding of the contract; nor is it reasonable in him "to expect that for the purpose of recovering on a small "policy on profits a merchant should, by not abandoning "the cargo, forego his insurance on that subject."

Mumford vs. *Hallet*, 1 *Johnson's Rep.*, 433. 439.

In an earlier case the same Court, in passing upon a claim against the insurer of profits, said:

"Whatever might have been the claim of the defend- "ant (the insurer on profits) on the insurers of the cargo "if an abandonment had been made to them (on which "our opinion is reserved), we think, as between him and "the owner, he had a right to pay the first cost of the "goods with all the charges and profits, according to valu- "ation, and on those terms to insist on an assignment. "To enable him to assert this right there ought to have "been a seasonable abandonment which, notwithstand- "ing the decision just referred to, should always be made "as soon as possible, where the disaster, as was the case "here, is of such nature as not to divest the assured of "property. This is a case of some novelty on which "precedents throw very little if any light. It is very "probable, therefore, that our view of it may be incorrect, "but, after mature reflection, we cannot come to any "other result satisfactory to our own minds. If wrong, "the precedent will not work much mischief, for it can- "not be long before underwriters, in this State, at least, "discover the folly of insuring, unless at a very advanced "premium, either profits or freight."

Tom vs. *Smith*, 3 *Caines*, 245, 251.

As to the mere matter of form, therefore, it is apparent that the libellant is not prejudiced by the fact that an abandonment was not made to the respondent.

An abandonment, moreover, is not called for when the loss is total. The only function is to convert a constructive total loss into a total loss.

If the sugars were to be abandoned to any one they would need to be abandoned to the Atlantic Mutual Insurance Company. Such abandonment would take with them all profits in every form of increment and incident. There would be nothing left to abandon to the respondent. The reasoning in the case of *Tom* vs. *Smith* shows that the only object of abandonment to the respondent would be to enable it to redeem the abandoned cargo from the Atlantic Mutual, paying to the Atlantic Mutual its loss, and paying to the libellant its insurance. Such a right would be absolutely barren, a right as valueless as the abandonment of a ship that has been annihilated by storms and sent to the bottom of the ocean; and in such situation no abandonment is necessary (*District Court Opinion, Record, p.* 74.).

Fourth.

THERE WAS A VIRTUAL ABANDONMENT OF THE SUGARS BY THE LIBELLANT TO THE ATLANTIC MUTUAL INSURANCE COMPANY, AND AN ACCEPTANCE OF SUCH ABANDONMENT, BY WHICH THE SUGARS BECAME A CONSTRUCTIVE TOTAL LOSS TO THE LIBELLANT. AND WITH THE LOSS OF THE SUGARS, ALL PROFITS WERE LOST.

In determining the character of the transactions between the libellant and the Atlantic Mutual Insurance Company, the respondent, so far as it is concerned, is not in position to raise hypercritical questions as to form.

The course of events indicates an abandonment by the libellant to the Atlantic Mutual and an acceptance of abandonment by that company. There are forms lacking which would have been supplied at any moment by the libellant if the insurer had indicated a disposition to question the abandonment.

But forms may be waived and some were waived in this case. But such circumstances did not render the abandonment of the cargo less effective, nor can advantage be taken of any omissions of form by the respondent. Even a defendant underwriter may be held responsible for a constructive total loss when there has been no formal abandonment, upon the ground either that he has waived an abandonment or that his actions indicated that the proceedings were sufficient to constitute an abandonment.

"If an abandonment is wanting in any formality the "insurer may waive all objection, and they do this by "calling for the proof and acting as if the abandonment "were altogether sufficient."

Parsons on Maritime Law, Vol. II., 398.

"In the United States the courts hold, that where the "nature of the transaction is such as to leave no reason-"able doubt of the intention of the insured to abandon, "and of that intention being understood by the under-"writer, it shall be implied that a proper offer of aban-"donment has been made, though no formal notice can "be proved to have been given."

Arnould on Mar. Ins., 958, 959.

"Mr. Justice STORY, speaking of abandonment and "notice of abandonment in the case where notice was re-"quired by the policy, but neither the form of notice nor "the abandonment was described, said: 'They may be in "'one or two instruments; they may be in direct terms "'or by fair and natural inferences; it matters not how "'they are given or executed.'"

Phillips on Ins., Sec. 1678.

What happened in this case?

On July 7th the libellant telegraphed to the Atlantic Mutual that the *John E. Sayre* was reported ashore off the coast of Newfoundland (*Drummond, p.* 15). In acknowledging receipt of this notice the Atlantic Mutual announced that they had been previously advised of the disaster and had put the matter in the hands of Harvey & Co., their agents at St. Johns, Newfoundland (*Exch*, 5, *p.* 40).

The libellant took no part in the rescue of the sugar, was not asked to take part, and in fact was not expected to take part.

The Atlantic Mutual took entire control and on July 10th wrote to the libellant that sugar had been saved from the between-deck, and that they hoped "to arrange to have it sent to Montreal" (*Exh.* 6, *p.* 41).

A few days later, July 14th, the libellant, learning that inquires were being made in Montreal for a market for certain of the sugar, telegraphed to the Atlantic Mutual:

"Sugar supposed *ex John E. Sayre* being offered "her by brokers representing Newfoundland parties" (*Drummond, p.* 15).

On the same day this telegram was confirmed by a letter in which the libellant wrote:

"We gave no answer to these persons, but advised you "by telegram that *your local agent* at North Sydney *may* "*protect your interests*" (*Exh.* 6*x*, *p.* 41).

To which the Atlantic Mutual replied on the same date:

"Have not authorized sale. Master of *Sayre* agreed to "give salvors one-half sugar. We have directed all for- "warded to Montreal, allowing one cent pound salvage" (*Exh.* 7, *p.* 41).

In confirming this telegram the Atlantic Mutual wrote, setting forth the agreement made between the master and the salvors, and stating that they were in treaty to purchase the salvors' half of the salved sugar.

This is all that passed between the libellant and the Atlantic Mutual until the saved fragments of the shipment reached Montreal in August.

What had happened in Newfoundland?

The agent of the Atlantic Mutual had appeared at the scene of the wreck, had displaced the master of the *John E. Sayre*, had paid the ocean freight upon the sugars to the owners of the vessel (*Rouse, p.* 24; *Drummond, p.* 17), and had taken entire control of the cargo. The master testifies:

"Mr. Pike took charge of the cargo, and of course I had "paid some two or three hundred dollars expenses in "landing and storing it, which he paid me back; or two "hundred of it he paid me back. Well, that was all I "knew about the cargo. I was done with it then.

"Q. You left it then in his hands? A. I left it in his "hands" (*Rouse, p.* 23).

And under cross-examination he says:

"Q. When did you cease to have to do with the cargo, "captain? A. Well, when I was paid this $200 on ac- "count and instructed to give up the cargo by my owner.

"Q. That was about when? A. Well, I couldn't tell "you the date; it was one or two days or perhaps three "days after the ship was stranded, but the date I don't "just remember" (*Rouse, p.* 24).

The Atlantic Mutual's agents then weighed the sugar in the presence of the salvors, set off to the salvors the half that belonged to them (*Pike, pp.* 33, 34, 35; *Exhs.* 2, 3, *pp.* 71, 72).

The Atlantic Mutual were then in supreme control of the salved sugar. The master and owners of the *John E. Sayre* had been paid off and had left the scene (*Rouse, pp.* 23, 24; *Harvey, pp.* 26–31; *Pike, pp.* 33–38).

To be sure the Atlantic Mutual had undisturbed possession at first of only one sixteenth of the original cargo, the title to the remaining portion of the salved cargo being vested in the salvors. They, however, purchased the salvors' portion, and by purchase, *and by purchase only*, acquired title to another sixteenth. The sugar was then shipped to Montreal under a new contract of transportation. The original voyage had been broken up, and the contract between the shippers and the shipowner abandoned.

The new shipment was made in the name of Harvey & Co , they being the agents of the Atlantic Mutual Insurance Company, upon the coasting steamer *Tiber*, for delivery at Montreal, "to the Atlantic Mutual Insurance Company of New York" (*Harvey Exhs.* 17, 18, 19, *pp.* 66, 67, 68).

Here was a complete assumption and declaration of ownership by the Atlantic Mutual.

Mr. Drummond has testified to what occurred when the sugar arrived in Montreal.

" When it arrived the Atlantic Mutual sent a represen-
" tative (Mr. Darragh) to Montreal, who received it, and
" subsequently handed it over to us on a settlement.
" Q. From Mr. Darragh? A. Yes.
" Q. On what basis of value did you receive that sugar
" from Mr. Darragh, do you remember? A. I am not
" very sure; I think we took it approximately at its in-
" sured value, if I remember rightly.
" Q. Was any examination made by you of the grades
" of the sugar which arrived as to whether it was one,
" two and three, or not? A. Impossible to do that; we
" took it as an average.
" Q. It has been shown that certain of these bags of
" sugar were wet; was there any attempt made by you
" to adjust any item of loss in that respect accurately
" with Mr. Darragh? A. I don't think so " (*Drummond, p.* 16).
" Q. What do you consider as to your legal rights in re-
" spect to this sugar, when it came to Montreal? A. Prac-
" tically the sugar was in the possession of the Atlantic
" Mutual Insurance Company; was their property; but as
" its coming to Montreal would have brought it to a place
" where practically there was no market for it, we were
" obliged or considered ourselves entitled to deal with it
" apart from any question of legal rights on an equitable
" basis. We consequently arrived at a settlement as
" nearly mutually satisfactory as we could.
" Q. When that sugar came there did you think it was
" yours or theirs? A. It was theirs " (*Drummond, p.* 18).

The bills of lading of the *Tiber* under which the sugar was delivered in Montreal bear the endorsement of the " Atlantic Mutual Insurance Company by A. A. Raven, " Second Vice-President " (*Exhs.* 17, 18, 19, *pp.* 67, 68, 69), and under that endorsement the delivery was made.

The form of the transaction establishes that the sugars were regarded by both the libellant and the Atlantic Mutual as being the property of the Atlantic Mutual, and that they were purchased by the libellant from the Atlantic Mutual, at an average existing value substantially equal to the insured value. If the parties had been settling their loss upon the basis of a partial loss it is clear that the libellant would not have accepted the twenty-six tons

of wet sugar without specific allowance for the damage thereto. Nor would it have accepted the broken "assortment" at the full insured value.

If the libellant had declined to handle the sugar, when it came to Montreal, the situation was such that it could legally have insisted that an abandonment had been made and accepted, and could have collected a total loss from the Atlantic Mutual.

Both parties recognized this, and accordingly an adjustment was made, not upon surveys or upon any exact lines, but of a generally equitable character, by which, as the libellant alleges in its libel, it received the sugar "on ac- "count of and in part payment for the loss" (*Libel, Art.* 7, *p.* 3).

Certainly the respondent, who was not in any event entitled to an abandonment, has no right to question the position. The only right the libellant could possibly have had would be to intervene, pay the entire loss of the Atlantic Mutual, all the expenses of salvage and forwarding, a total loss under libellant's insurance upon profits, and take possession of the saved cargo.

Its only possible right, and this right is by no means admitted as a legal right, therefore, was to pay losses and expenses aggregating over $190,000, and to acquire title to sugars worth "about $20,000."

Naturally the respondent had no desire to make such intervention, though its agent in Montreal received "from time to time" all the information which the libellant had as to the position of the vessel and cargo (*Drummond, p.* 18).

Fifth.

ALL THE EQUITIES OF THE SITUATION ARE IN FAVOR OF THE LIBELLANT.

Not only has there been literally, in accordance with the terms of the certificate, a "total loss" of the profits, but

there has been a total loss of the profits on every grain of the sugars, through perils insured against.

While a small portion of the sugars reached destination, the circumstance was accomplished only by artificial measures and by extraordinary expenditures.

In respect of the sugars so delivered, the title to an undivided one-half had passed from the libellants to the salvors by virtue of Captain Rouse's agreement, and had passed from the salvors to the Atlantic Mutual by sale and purchase, and after being so vested in two strangers, came back to the libellant only by virtue of a "settlement" with the Atlantic Mutual (*Drummond, p.* 18),

Instead of the value of $181,000, which is admitted to have existed upon the day the respondent wrote its insurance (*Libel, Art.* 5, *p.* 2; *Ans., Art.* 4, *p.* 9), there remained a net value in Montreal of not over $7,000, to which the Atlantic Mutual was entitled, and in respect of which it had in fact practically accepted an abandonment.

The respondent made insurance upon the "profits" of the cargo, the only limitation being "against total loss only."

There is a provision which is commonly inserted in policies upon profits, and which Mr. Phillips thinks is quite essential for the protection of the underwriter. He refers to it as follows:

> "It accordingly appears to be quite necessary, in such "a policy, to stipulate for a settlement of loss and claim "for return of premium in the same manner as on the "goods, or to make some other agreement to avoid uncer-"tainty."
>
> *Phillips on Ins., Sec.* 1242.

This is practically accomplished by underwriters stamping the policy or certificate of insurance with these words or words equivalent thereto:

> "This company is liable only for the same proportion of "loss on profits that it would be under this policy on the "merchandise from which the profits accrue and is en-"titled to the same salvage."

The respondent did not so stamp its policy or certificate, and it is to be presumed that it received a due consideration in the way of premium for omitting such stamp.

It should have contemplated, and probably did contemplate, for it is an intelligent insurer, the responsibility imposed upon it by the insurance which it made.

It cannot claim exemption, after a loss occurs, which the contract of insurance does not give it.

Sixth.

THE UNITED STATES CIRCUIT COURT OF APPEALS HAVE ERRED IN HOLDING THAT THERE MUST BE AN ABSOLUTE AND ENTIRE LOSS OF CARGO IN ORDER TO EFFECT A TOTAL LOSS OF PROFITS.

There is no authoritative judicial decision in the United States distinguishing between a constructive total loss on cargo or vessel and a constructive total loss on profits.

The rule that a fifty per cent. loss affords sufficient foundation for a constructive total loss of either vessel or cargo is well established.

There is no rule requiring a broader basis for a constructive total loss of profits.

The English rule, which is more onerous upon the assured than the American rule in the measure of a constructive total loss on vessel or cargo, admits a total loss of profits when in ordinary parlance the profits have been eaten up or consumed by a marine peril, even though the subject matter out of which the profits grew continued to exist. Thus, in a case where the profits of a charter were insured "warranted free from all average," it appeared that the plaintiffs had chartered a steamer for a lump sum and had taken on a general cargo at freights aggregating several hundred pounds more than the charter hire, and had insured this surplus as profits. A certain portion of the cargo being damaged by marine perils was ruined, and the freight on such portion of the cargo was

lost. As a result, the freights actually collected by the assured from the remaining cargo, were less than the charter hire.

It was held that there was a total loss of profits.

Asfar & Co. vs. *Blundell*, 1 *Q. B.*, 1895-1896, *p.* 123.

The Circuit Court of Appeals holds in effect, not only that such a rule is bad, but it holds that a constructive total loss of cargo does not carry with it a total loss of profits, and it goes still further, and holds that *if any item of the cargo survives*, even in a damaged condition, or burdened with liens, there can be no total loss of profits.

There is some uncertainty among text writers as to what constitutes a total loss of profits; but no text writer has intimated any such rule as is laid down by the Circuit Court of Appeals.

Mr. Parsons argues that the necessity which rests upon the assured of transferring by abandonment to the underwriter on cargo the remnants of goods saved, in order to constitute a constructive total loss, creates an inability on the part of the assured to make any abandonment to the underwriter on profits; and that, therefore, there can never be a constructive total loss of profits.

Parsons on Maritime Law, *Vol. II.*, *pp.* 394-5.

Mr. Phillips makes a similar suggestion in his work.

The intimations of these writers relate, however, to instances where some portion of the cargo has come through to destination undamaged, and without extraordinary charges, so that there exists an *actual profit on such portion of the cargo*, which profit the assured is compelled to surrender to his underwriter on cargo, in order to claim a total loss.

The Circuit Court of Appeals has failed to note the reservations of these writers, and has applied their intimations to the case at bar, without observing that *there was no particle of profit* attaching to any portion of the remnant of sugars *that arrived* in Montreal.

The profits had been consumed by the breaking up of the "assortment" of sugar, by the physical damage through wet, and by the expenses of salvage, storage and forwarding.

The only judicial decision in the United States upon the question is that of Mr. Justice Kent in *Abbott* vs. *Sebor*, This opinion is opposed to the views of the text writers above referred to, but was accepted in this case by the District Judge as authoritative.

Mr. Justice Kent said:

"What shall be the criterion of an average of a total "loss in respect to profits I cannot at present with "clearness decide. Perhaps the established rule, in "respect of ship and cargo, of a loss of more or less "than half the subject in value may be applicable. If "so, the question here will be whether the more profit-"able half of the cargo might not have been brought in "the same ship to New York. I suggest this as a rule that "may perhaps supply."

Abbott vs. *Sebor*, 3 *Johnson's Cases*, 39, 46.

In the case at bar less than one-eighth of the cargo reached destination.

Let us suppose there had been no insurance on the cargo, but that only the profits over and above the prime value of $166,145 had been insured.

Let us suppose, further, that the original sea carrier had forwarded the fragment of saved sugar through to destination and delivered it –not from the original carrying vessel, but from a forwarding vessel—to the consignee. The delivery would have been burdened with salvage liens of fifty per cent., and liens for storage and forwarding expenses of fully fifteen per cent. The goods, themselves, would have been in a broken assortment and damaged by sea water. The net value delivered to the consignee would be $7,000 against an interest valued by the insurer of profits at $166,145. The $7,000 would not have represented sound sugar unencumbered by liens, but would have represented merely an equity under the burden of salvage and kindred expenses. Can it be said that the consignee who has suffered a loss of $166,145 must give

up all the remnants of the cargo to the insurer who has insured the profits?

The learned District Judge, in his accurate and well-reasoned opinion (*Record, p.* 73), shows full appreciation of the situation.

The learned Judges of the Circuit Court of Appeals have, we respectfully submit, gone astray on the facts, and have thereby been led to an unsound legal conclusion.

They are at direct issue with the learned District Judge; they are at direct issue with the only other American authority; they are at direct issue with the English authorities. Their conclusion is based upon the error of assuming that the libellant received any portion of profits.

They say in their opinion:

"By the decree of the Court below the libellant has "been awarded a recovery which, if collected, would put "into its pocket the *profits realized on the cargo saved*, "in addition to the amount of the respondent's policy. Ir-"respective of this consideratlon, *and because it has* "*received the profits on a part of the cargo*, we are of "the opinion that there has not been a total loss of profits, "within the meaning of the contract."

Opinion, p. 81.

The primary and the secondary considerations stated by the Court are strikingly similar, both depending for life upon the single incorrect proposition that the libellant has received profits on any portion of the cargo.

This blemish in the phraseology of the opinion is due to a correction which is apparent upon an examination of the original transcript of record. In writing the opinion originally, the Court said:

"By the decree of the Court below the libellant has "been awarded a recovery which, if collected, would put "into its pocket *nearly* $10,000 *in excess of its actual loss.* "Irrespective of this consideration, and because," &c., &c.

Original Transcript of Record, p. 127.

This erroneous statement was not corrected until after the record had been prepared for transmission to this Court. It was apparently understood by the Circuit Court of Appeals that the libellant was receiving not only its full in-

surance of $166,145 from the Atlantic Mutual, but that it was also receiving the net value of the damaged cargo, which was computed at "about $10,000, after deducting salvage and expenses" (*Opinion, p. 79*), and that it was seeking further to recover $15,000 from the respondent, with the result of putting into its pocket $10,000 over and above the full value of $181,145.

This misunderstanding is so radically wrong that it cannot be set right without a complete overturning of the structure erected by the Judges of the Circuit Court of Appeals.

That they should have carried such impression indicates that they failed to understand the facts of the case, and it was upon their misunderstanding of the facts that they based the rule of law under which they would have dismissed the libel.

If it is to be considered that the libellant did receive $166,145 from the Atlantic Mutual Insurance Company, then such consideration carries with it the necessary consequence that it did not *receive* any portion of the sugars, and that the $15,000 due from the respondent would merely make it whole. Its purchase of the remnant of damaged sugars at an agreed price would be deemed a collateral and immaterial fact.

If, however, it is desired to take into consideration the circumstance that the libellant did subsequently become possessed of the remnant of damaged sugars, it is necessary to understand that the *full* value of such sugars, "about $20,000," was credited upon the Atlantic Mutual's policy, and that the actual cash paid by the Atlantic Mutual, together with the damaged value of the sugars, together with the $15,000 from the libellant, aggregated barely enough to make the libellant whole.

The error of the Circuit Court of Appeals is not based upon any dispute of facts, because there is not a single disputed fact in the entire record; but upon a pure misunderstanding of the situation.

The gross value of the sugars which reached Montreal was admittedly "about $20,000" (*Libel, Art. 7, p. 3; Ans.,*

Art. 6, *p.* 10). The charges of salvage and storage and forwarding, whereby the value of the remnant of sugars was reduced from "about $20,000" to "about $10,000," as stated by the Circuit Court of Appeals (though actually reduced to about $7,000), were charges entirely foreign to the libellant, and were *never* in any manner within its contemplation. In taking the sugars over from the Atlantic Mutual the libellant allowed to the Atlantic Mutual $23,396.19, a valuation arrived at in view of the damaged condition and broken assortment of the sugars and substantially in accord with the sound insured value. It was a fair valuation and equitably arrived at. It was certainly a full valuation.

The libellant received simple indemnity from the Atlantic Mutual, its loss being paid by sugars valued at $23,396.19 and by cash $142,748.81, making a total of $166,145, the amount insured (*Policy, p.* 42).

Equally erroneous is the view taken by the Circuit Court of Appeals that the libellant has realized profits on that portion of the cargo which reached Montreal.

The Court has found as a fact that the Atlantic Mutual "adjusted the loss with the libellant by paying the "equivalent of the whole amount of its policy less the in-"sured value of the sugar delivered to the libellant" (*Opinion, p.* 78).

Practically this finding of fact is not far out of the way, although it would be more accurate to say that the Atlantic Mutual delivered the sugar which reached Montreal to the libellant in part payment of the loss under the policy at an agreed valuation substantially coincident with the insured value of the sugar, and that it paid the balance of its policy in cash.

The circumstance, whichever way the recitals are phrased, that the libellant took over the sugars in Montreal at substantially their insured value establishes indisputably the character of the transaction, and shows that the loss was settled as a total loss and not as a partial loss.

If the parties had been adjusting their differences on the basis of a partial loss there would necessarily have been a specific allowance for the damage to the twenty-

six tons of wet sugar and for the damage incident to the broken assortment of the sugars.

As it was, the libellant took over the sugars as though by purchase at an agreed average price. Whether their bargain was a good one or a poor one for either party is immaterial.

While this Court has never passed directly upon the point at issue in this action, it has held that insured profits are recoverable even though they are not tangibly earned and merely awaiting realization, as they were in the case at bar, but are mere expected profits. Thus, where a ship owner starting his vessel off as a trader upon a long round voyage, insured the expected profits of the venture in the valued sum of $20,000, and the vessel was lost with her cargo before she passed the first stage of her voyage, a full recovery was permitted without any proof that profits would have been realized if she had not met disaster.

In that case the Court said:

" It seems difficult to perceive why, if profit be a mere " excrescence of the principal, as some judges have said; " or an incident to or identified with it, as others have " said; why the loss of the cargo should not carry with it " the loss of the profits. This rule has convenience and " certainty to recommend it; of which this case presents a " striking illustration. Here was a voyage of many " thousand miles to be performed, the final profits of " which must have been determined by a statement of " accounts passing through several changes, some of " which might have resulted in loss, some in gain; and in " each case the good or ill-fortune of the adventure turn- " ing on the gain or loss of a day in the voyage. What " human calculation or human imagination could have " furnished testimony on a fact so speculative and for- " tuitous? To have required testimony to it, would have " been subjecting the rights of the plaintiff to mere " mockery."

Patapsco Ins. Co. vs. *Coulter*, 3 *Peters*, 221, 241.

In an early English case it was held that the breaking up of a voyage through the loss of a vessel, the cargo being

entirely saved and reaching destination, constituted of itself a total loss of profits, the theory being that the merchant was entitled to a delivery at destination from the vessel in which the goods had been shipped.

Barclay vs. *Cousins*, 2 *East.*, 544.

The rule suggested by the Circuit Court of Appeals, that every ounce of cargo must be lost physically in order to entitle the libellant to recover, cannot be commended as either fair or as being within the ordinary contemplation of the parties. It would permit the respondent, upon seeing the loss of $15,000 staring it in the face, to make an expedition and bring to Montreal a single bag of sugar, and upon landing it there, find itself discharged from all liability, the libellant being cut off from an examination even of the expenses to which its insurer had been subjected in order to make this "mere mockery" of a delivery.

Seventh.

IT IS RESPECTFULLY URGED THAT THE DECREE OF THE UNITED STATES CIRCUIT COURT OF APPEALS SHOULD BE REVERSED, AND THAT A MANDATE SHOULD ISSUE TO THE DISTRICT COURT TO EXECUTE ITS JUDGMENT HERETOFORE ENTERED, WITH INTEREST AND COSTS.

BUTLER, NOTMAN, JOLINE & MYNDERSE,
Proctors for Libellant and Petitioner.

WILHELMUS MYNDERSE,
Advocate.